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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois
Counsel of Record

DEBORAH L. AHLSTRAND
Assistant Attorney General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Attorneys for Petitioner

Printed by Authority of the State of Illinois (P.O. 36194—60—9-28-94)

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QUESTION PRESENTED

An Illinois claimant for unemployment insurance benefits must have earned specified wages during his "base period," the first four of the last five completed calendar quarters preceding his "benefit year," which begins to run with the filing of his valid claim for benefits.

The question presented is whether Illinois' base period is a component part of the monetary eligibility criteria of the state's unemployment insurance program and, therefore, is not subject to the requirement of the Social Security Act that a state promptly pay benefits "when due."

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Lynn Q. Doherty, Director of the Illinois Department of Employment Security and successor in office to Loleta Didrickson and Sally Ward, former Directors of the Illinois Department of Employment Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying rehearing is not officially reported but may be found at 1994 U.S. App. LEXIS 12754 (App. 25). The opinion of the court of appeals is reported at 22 F.3d 1376 (App. 1).

The final opinion of the district court is not officially reported (App. 28). The district court's memorandum opinion and order of January 22, 1986, denying, in part, defendant's motion to dismiss is not reported (App. 57). The district court's memorandum opinion and order denying defendant's motion for summary judgment, dated June 13, 1989, is not officially reported, but may be found at 1989 U.S. Dist. LEXIS 7651 (App. 48). The district court's memorandum opinion and order denying defendant's motion to reconsider, dated August 7, 1989, is not officially reported but may be found at 1989 U.S. Dist. LEXIS 9512 (App. 43).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on April 11, 1994. Defendant below filed a petition for rehearing and suggestion of rehearing in banc on May 16, 1994, pursuant to an enlargement of time. On May 31, 1994, the court denied the defendant's petition for rehearing (App. 25).

On August 1, 1994, Justice Stevens entered an order granting petitioner an extension of time to and including September 28, 1994, to file this petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 503(a)(1)

§ 503. State laws.

(a) Provisions required.

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . . .

Section 237 of the Illinois Unemployment Insurance Act 820 ILCS 405/237 (1992)

* * * *

For each benefit year beginning on or after November 1, 1981, "base period" means the first four of the last five completed calendar quarters immediately preceding the benefit year.

* * * *

Section 242 of the Illinois Unemployment Insurance Act 820 ILCS 405/242 (1992)

"Benefit year" with respect to any individual means the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits. . . . Any claim for benefits . . . shall be deemed to be a "valid claim" for the purposes of this paragraph if the individual has met the requirements of Section 500E.

Section 500 of the
Illinois Unemployment Insurance Act
820 ILCS 405/500 (1992)

An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that:

* * * *

E. . . . . With respect to any benefit year beginning on or after January 3, 1982, he has been paid during his base period wages for insured work equal to not less than $1,600, provided that he has been paid wages for insured work equal to at least $440 during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest.

STATEMENT OF THE CASE

Introduction

Under the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq.* (1992), consideration for receipt of insurance benefits initially requires that an applicant file a "valid claim," meaning that the threshold monetary eligibility requirements of section 500E of the IUIA have been met. *See* 820 ILCS 405/500E (1992). This section provides that a claimant is only eligible if he was paid, during his "base period," $1,600 in wages for insured work, provided that at least $440 of that minimum amount was paid outside the calendar quarter in which the claimant's wages were highest. *Id.* Section 237 defines the "base period" as the first four of the last five completed calendar quarters preceding the benefit year, 820 ILCS 405/237 (1992), with the fifth quarter sometimes referred to as the

"lag quarter."[1] A claimant's benefit year begins to run with the filing of a valid claim. 820 ILCS 405/242 (1992).

This action was brought to question whether Illinois' base period requirement is a valid eligibility criterion. As is shown in the first of Illinois' reasons for granting the writ, most jurisdictions that administer unemployment insurance programs have a similar base period requirement.

Nature of the Action

Plaintiff below, Luella Pennington, individually and on behalf of a certain class of applicants for unemployment insurance benefits, brought this civil rights action against the Director of the Illinois Department of Employment Security ("IDES") in 1985. Pennington was denied unemployment insurance ("UI") benefits upon filing her June 1984 claim because she had earned no wages during her base period, the four calendar quarters of 1983 (App. 71). In October 1984, she was monetarily eligible for UI benefits based on her earnings in the first and second quarters of 1984 (App. 71), and she did receive benefits for the benefit year beginning October 1984 after filing a valid second claim.

In the district court, Pennington represented a class of claimants who are monetarily ineligible for benefits and who seek eligibility status by including their earnings that fall outside section 237's base period (App. 71). The plaintiff class challenged, as violative of the federal law, the Illinois statutory definition of "base period" (App. 65), con-

[1] Each Illinois employer is required to report the wages paid to employees in each calendar quarter; the wage report is to be filed within thirty days of the end of each quarter. 820 ILCS 405/1400 (1992).

tending that it delays benefit payments to eligible claimants in violation of the Social Security Act's requirement that a state law include "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation *when due.*" 42 U.S.C. § 503(a)(1) (emphasis added).

The Director contended that the defined base period is a component part of Illinois' eligibility requirements, which federal law fully entrusts to the states. When a claimant cannot meet state eligibility requirements, the "when due" obligation never becomes operative. Alternatively, the Director sought to demonstrate that the base period established by Illinois law does not violate the "when due" provision (App. 66).

Proceedings in the Courts Below

During the district court proceedings, the Director of IDES moved to dismiss plaintiff's action and later sought summary judgment, relying in part on the ground that section 237 constitutes a valid state eligibility requirement. (R. Doc. 14 & 97). The United States Department of Labor ("USDOL"), as *amicus curiae*, joined in the Director's summary judgment motion. (R. Doc. 98). The district court denied both motions (and a request to reconsider), believing that the base period was subject to the "when due" clause's requirement of prompt determination and payment to eligible claimants. (App. 57, 48, 43).

Following denial of the Director's motions, the parties stipulated to many facts, procedures and issues (App. 64), and they then went to trial on disputed evidence regarding the feasibility of implementing and utilizing an alternative base period definition. Without resolving the disputed matters, however, the district court entered judg-

ment for the Director, effectively overruling its prior determinations and deciding that the base period was an eligibility requirement.

The Court of Appeals reversed the district court's judgment and held that section 237 is not an eligibility criterion. Rejecting not only the position of the Director, but also the federal government's assertion of "its long-standing view that issues of lag periods are matters of eligibility and therefore are not subject to the 'when due' clause and, indeed, are within the exclusive responsibility of the states," (App. 14), the Seventh Circuit ruled that section 237 is "an administrative method subject to the strictures of the 'when due' clause of the Social Security Act" (App. 24). It remanded the case to the district court for factual findings and a determination whether Section 237 complies with the "when due" clause and associated regulations (App. 24).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS JEOPARDIZES THE UNEMPLOYMENT INSURANCE PROGRAMS OF THE VAST MAJORITY OF STATES.

In a case of nationwide first impression, the decision below addressed a question of exceptional importance and—beyond precedent and contrary to the federal administrative interpretation—extended the scope of the federal mandate of prompt administration of state unemployment insurance laws to Illinois' base period requirement, which measures monetary eligibility for benefits. The brief of the United States, as amicus curiae in the court below, explained that "forty-seven other states and jurisdictions

use a base period similar to that challenged here," Brief for the United States of America as Amicus Curiae at 18,[2] and expressed the concern of the federal government

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[2] The United States provided the court of appeals with the following citations, at pages 18-19 of their *amicus* brief:

Ala. Code § 25-4-1 (1992); Alaska Stat. § 23.20.520(3) (1992); Ariz. Rev. Stat. Ann. § 23-605 (1992); Ark. Code Ann. § 11-10-201 (Michie 1992); Cal. Unemp. Ins. Code § 1275 (Deering 1993) (base period is either the first four of last five quarters or first four of last six quarters); Colo. Rev. Stat. § 8-70-103(2) (1992); Conn. Gen. Stat. § 31-230 (1990); Del. Code Ann. tit. 19, § 3302(2) (1992); D.C. Code Ann. § 46-101(6) (1992); Fla. Stat. ch. 443.036(5) (1991); Ga. Code Ann. § 34-8-21 (Michie 1992); Haw. Rev. Stat. § 383-1 (1992); Idaho Code § 72-1306 (1992); Ind. Code Ann. § 22-4-2-12 (Burns 1992); Iowa Code § 96.19(16) (1991); Kan. Stat. Ann. § 44-703(b) (Supp. 1991); Ky. Rev. Stat. Ann. § 341.090(1) (Baldwin 1992); La. Rev. Stat. Ann. § 23:1472(4) (West 1992); Me. Rev. Stat. Ann. tit. 26, § 1043.3 (West 1992); Md. Lab. & Employment Code Ann. § 8-101(b) (1992); Minn. Stat. § 268.04, subdivision 2 (1992); Miss. Code Ann. § 71-5-11(A) (1991); Mo. Rev. Stat. § 288.030.1(2) (Cum. Supp. 1991); Mont. Code Ann. § 39-51-201(2) (1992); Nev. Rev. Stat. Ann. § 612.025.1 (Michie 1991); N.J. Rev. Stat. § 43:21-19(c)(1) (1992); N.M. Stat. Ann. § 51-1-42(A) (Michie 1992); N.C. Gen. Stat. § 96-8(18) (1992); N.D. Cent. Code § 52-01-01.3 (1991); Ohio Rev. Code Ann. § 4141.01(Q)(1) (Baldwin 1992); Okla. Stat. tit. 40, § 1-202 (1991); Or. Rev. Stat. § 657.010(1) (1991); 43 Pa. Cons. Stat. § 753(a) (1992); P.R. Laws Ann. tit. 29, § 702(b) (1989); R.I. Gen. Laws § 28-42-3(10) (1992); S.C. Code Ann. § 41-27-150 (Law. Co-op. 1991); S.D. Codified Laws Ann. § 61-1-1(14) (1992); Tenn. Code Ann. § 50-7-218 (1992); Tex. Rev. Civ. Stat. Ann. art. 5221b-17(a)(2) (West 1993); Utah Code Ann. § 35-4-22(1) (1992); V.I. Code Ann. tit. 24, § 302(b) (1992); Va. Code Ann. § 60.2-204 (Michie 1992); Vt. Stat. Ann. tit. 21, § 1301(17)(B) (1991); Wash. Rev. Code § 50.04.020 (1991); W. Va. Code § 21A-1-3 (1992); Wis. Stat. § 108.02(4) (1989-90); Wyo. Stat. § 27-3-102(a)(i) (1992). The federal government went on to explain that, of these forty-seven jurisdictions, only five states (Maine, Ohio, Rhode Island, Vermont and Washington) used the type of movable base period advocated by the plaintiff class as an alternative. Brief for U.S. as amicus curiae at 19 n.7).

Two more states have recently adopted base periods of the first four of the last five quarters. Mass. Ann. Laws ch. 151A § 1 (1994); Mich. Comp. Laws § 421.45, as amended by 1994 Mich. Pub. Act 162. Both of these states also provide for an alternative base period.

that "an order striking down the Illinois law undoubtedly would cause nationwide disruption in the various states' unemployment compensation systems." *Id.* at 19-20. That feared disruption is now imminent as a result of the decision below.

Although Illinois has maintained, alternatively, that its base period would satisfy the administrative feasibility requirement under the "when due" clause regulation, 20 C.F.R. § 640.3(a) (1994),[3] any eventual success under that criterion would leave the State—and other similarly situated States—with the continuing need to litigate and justify base period methodology any time that a creative plaintiff advances an alternative that the courts had not already considered. Rather than relegate State unemployment insurance administrators to further years of uncertainty and costly litigation, this Court is urged to grant a writ of certiorari and to review the propriety of a base period requirement as an eligibility criterion for unemployment benefits.

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[3] The court of appeals cited the Director's alternative argument as evidence of her "concession" that a lag period is required for administrative reasons (App. 21). In fact, the Director's argument was made in the trial court with respect to the only issue that remained for trial: that of the administrative need for Illinois' base period. Likewise, the Director's position in the Seventh Circuit on this issue was advanced only in the alternative, assuming for the sake of argument that the base period was not an eligibility requirement. No such alternative issue is raised by this petition, and the Director urges this Court to recognize that administrative timing considerations are only applicable if the base period is not a valid eligibility criterion.

II.

WHERE CONGRESS HAS ENTRUSTED UNEMPLOYMENT INSURANCE ELIGIBILITY STANDARDS TO THE INDIVIDUAL STATES, THE SOCIAL SECURITY ACT'S "WHEN DUE" CLAUSE PROVIDES NO BASIS FOR INVALIDATING ILLINOIS' BASE PERIOD.

The court below concluded that, as a matter of law, section 237's definition of Illinois' base period was not an eligibility criterion, but rather was an administrative method and, therefore, subject to the "when due" clause. However, neither the plaintiff class nor the Seventh Circuit disputed that Illinois' requirement of certain earnings during some stated time frame is a legitimate measure of eligibility for UI coverage.

If an earnings requirement is not objectionable as an eligibility criterion, the specific components of that criterion should be recognized as substantive eligibility requirements, rather than methods of administration. The Seventh Circuit's decision represents the first time that the "when due" clause has been extended to reach a component part of the eligibility test itself. This extension blurs the very real distinction between substantive eligibility criteria and administrative methodology, a distinction that is well grounded in decisional law.

A. The Social Security Act's "When Due" Clause, Which Requires The Prompt Determination Of Eligibility And Prompt Payment To Eligible Claimants, Does Not Define Eligibility Criteria.

Section 303(a) of the Social Security Act addresses standards for a state's certification for federal funds and provides, in relevant part, that a state's "methods of administration . . . [must be] found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation *when due.*" 42 U.S.C. § 503(a)(1)

(emphasis added). The USDOL has interpreted the "when due" clause to require that the states' UI statutes contain "methods of administration of the law" that assure both the "prompt determination" of eligibility or ineligibility status and the "prompt payment" of benefits "when determined under the State law to be due to claimants." 20 C.F.R. § 640.1(a)(1) & (2) (1994). Generally, regulations require that the methods of administration be reasonably calculated to assure full payment to "*eligible* claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a) (1994) (emphasis added).

While section 303(a) addresses the states' methods of administering their UI laws, it does not reach the threshold eligibility criteria established by UI laws. The Act and the regulations are silent on base periods and other standards of eligibility.

None of the previous "when due" clause cases has disturbed the eligibility standards that establish which persons have earned initial coverage under the individual States' insurance programs.[4] In *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), the claimants were found initially eligible for benefits; however, benefits were suspended when their employer took an appeal to raise the disqualification issue of "discharge for cause." 402 U.S. at 123. This Court ruled that the statute violated prompt payment requirements "after an initial determination of eligibility." *Id.* at 133.

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[4] The court below erroneously construed the Director's argument as one that distinguished prior case law on the basis of whether an initial determination of eligibility had been made by the state agency (App. 19). As will be shown in the following discussion, the distinction made by the Director has been, and continues to be, one between the *procedures* to determine eligibility under a state's criteria and the *provisions* of those eligibility criteria.

The *Java* Court deemed payments to be "due" for purposes of section 303(a) at the earliest time administratively feasible after the worker and employer have an opportunity to be heard. *Id.* This Court, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), read *Java* to require the prompt disposition of valid claims submitted to the administrative process for determination. 419 U.S. at 387-88. *See also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) (unsuccessful challenge to USDOL's regulation on the disposition of second level appeals to Board of Review from adverse determination of eligibility, discussing *Fusari*).

However, when the claimant in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), attempted to extend the "when due" clause and *Java* to attack Ohio's decision not to cover workers whose unemployment resulted from a labor dispute, this Court firmly rejected that attempt, stating that "[n]othing in *Java* purported to define the class of persons eligible for benefits. The Court's sole concern there was with the treatment of those who already had been determined under state law to be eligible." 431 U.S. at 486-87.

Consistent with the decisions of this Court, the Seventh Circuit, in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), dealt with an IUIA provision that held in abeyance the determination of benefit rights of claimants subject to disqualification pending the outcome of certain criminal proceedings. The *Jenkins* court enjoined the use of the "held in abeyance" provision, noting that forty percent of the claimants ultimately were not disqualified and, although entitled to retroactive benefits, had experienced an average delay of 448 days. 691 F.2d at 1229-30, 1234. The court, however, distinguished the administration of the law from the law's eligibility criteria in discussing prompt payment and adjudication:

> Of course he [the claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment.

Id. at 1229.

Neither the Act, federal regulations, nor case law provides authority to disturb monetary eligibility requirements by applying the "when due" clause to questions of eligibility, rather than to methods of administration. The distinction recognized by this Court in prior decisions, and, indeed, by the Seventh Circuit in *Jenkins*, was improperly rejected in the present case, injecting uncertainty into the UI programs of most states.

B. A Base Period Is A Component Part Of A State's Monetary Eligibility Requirements, Rather Than A Method Of Administration Subject To "When Due" Requirements.

"General [eligibility] rules are essential" to a state's UI program even though adverse consequences result in some cases. *Ertman v. Fusari*, 442 F. Supp. 1147, 1151 (D.C. Conn. 1977) (quoting *Califano v. Jobst*, 434 U.S. 47, 53 (1977)). Whenever a state legislature develops its minimal requirements for insurance coverage, some individuals will claim to be adversely affected by the requirements chosen. This inevitability does not, however, mean that a State's eligibility requirements may be discarded by the federal courts in order to award benefits to a claimant for whom benefits could only be "due" under different criteria. Illinois is not required to grant UI benefits to every unemployed person, *Hodory*, 431 U.S. at 483, and it has legitimately concluded that persons who cannot meet base period requirements fail its threshold criteria for coverage.

It is generally acknowledged that wage requirements during a base period serve to guarantee a worker's recent attachment to the labor market and to insure that the "premiums" have been paid on the statutory "insurance policy." As stated in the USDOL's 1962 UI Legislative Policy:

> *Rights* [to unemployment insurance] *are established during the base period* by workers in the labor force . . . . The base period is the period of the claimant's previous employment experience in insured work used as the base *for determining if he is "insured" under the program*, his weekly benefit, and maximum annual benefits.

(Plaintiff's appellate app. VIII) (emphasis added).

In establishing a threshold earnings qualification, Illinois intended to exclude from eligibility those claimants who generally have the most tenuous attachment to the workforce. Section 237's base period is as much a part of Illinois' monetary eligibility standards as are the requirements of earning $1,600 with $440 outside of one quarter. This base period defines a worker's recent employment history over a one-year period during which rights to UI benefits may or may not have been established.

Eligibility criteria also serve other purposes, some of which are not directly related to a worker's attachment to the workforce. For example, a person with a significant work history may be ineligible for benefits due to a labor dispute and permissible employer lockout. 820 ILCS 405/604 (1992). Another person may have worked for years before a layoff and the collection of twenty-six weeks (or two quarters) of benefits; if he returns to work and again becomes unemployed during the original benefit year, he will not be eligible for benefits until the year

has expired. 820 ILCS 405/403B (1992). As each state designs its own insurance program, it is entitled to define the parameters of that program.

Congress declined to establish a federal definition of the scope of coverage for UI benefits in the Social Security Act,[5] and that Act's "when due" clause should not be utilized by the courts to impose eligibility requirements on the states. As did most state legislatures, the Illinois General Assembly chose certain criteria to provide a "snapshot" of recent work history to define entitlement to coverage, including the designation of a base period. Because most states have made similar choices, all of which are now subject to question under the Seventh Circuit's reasoning, this Court should grant *certiorari* to provide state administrators with much needed guidance in ensuring the acceptability of their statutory schemes under federal law.

CONCLUSION

For these reasons, the Director of the Illinois Department of Employment Security respectfully asks this Court to issue a writ of certiorari to review the opinion and

[5] The federal government has, however, expressly adopted state base periods in establishing eligibility requirements for unemployment compensation for federal civilian employees, 20 C.F.R. § 609.3(a) (1994), and for ex-servicemembers. 20 C.F.R. § 614.3(a) (1994).

judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois
Counsel of Record

DEBORAH L. AHLSTRAND
Assistant Attorney General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Attorneys for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3725

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiffs-Appellants,

v.

LOLETA DIDRICKSON,* Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—**Paul E. Plunkett,** *Judge.*

ARGUED OCTOBER 26, 1993—DECIDED APRIL 11, 1994

Before ESCHBACH, RIPPLE and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs are a certified class of unemployment insurance claimants who brought action under 42 U.S.C. § 1983 against the Illinois Department of Employment Security ("IDES"). The plaintiff class chal-

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

lenges the definition of "base period" in section 237 of the Illinois Unemployment Insurance Act (the "IUIA"), 820 ILCS 405/237. It maintains that the definition violates the "when due" clause of section 303(a)(1) of the Social Security Act (the "SSA"), 42 U.S.C. § 503(a)(1). Following a bench trial, the district court entered judgment for IDES. For the reasons that follow, we reverse and remand the case to the district court.

I

BACKGROUND

A. *Statutory Scheme*

Although unemployment insurance is administered at the state level, the SSA makes federal funds available to the states to encourage them to enact unemployment insurance laws. However, before the federal government will provide funds for a state to administer its unemployment insurance programs, the Secretary of Labor must certify that a recipient state's program meets certain statutory requirements. *See* 42 U.S.C. §§ 502, 503(b)(2), 504. One of those requirements is the "when due" clause of section 303(a)(1) of the SSA; it requires a state's unemployment insurance laws to provide for "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Department of Labor regulations state that the "when due" clause requires a state to provide for such "methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Although "[f]ederal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law," the regulations make clear that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2).

In Illinois, an eligible unemployment insurance claimant can draw benefits in "the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits." 820 ILCS 405/242. This is known as a claimant's "benefit year." *Id.* However, in order to file a "valid claim" for unemployment insurance, a claimant must have earned sufficient wages during the claimant's "base period."[1] Section 237 of the IUIA defines a "base period" as "the first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237. Thus, section 237's base period excludes the wages a claimant earns in the quarter immediately preceding the quarter in which a claimant files (the fifth quarter, or the "lag quarter") and excludes the wages a claimant earns in the quarter in which the claimant files (the sixth quarter, or the "filing quarter"). For example, for a claimant who filed for benefits in June 1993 (the second calendar quarter of 1993), the resulting base period would have been the four calendar quarters of 1992; the first quarter of 1993 would have been the claimant's lag quarter, and the second quarter of 1993 would have been the claimant's filing quarter. Pursuant to section 237's base period, IDES would consider only the wages the claimant earned in the four calendar quarters of 1992 in determining the claimant's eligibility for unemployment insurance.[2]

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[1] Under section 500E of the IUIA, a claimant must have earned at least $1,600 in the entire "base period" and must have earned at least $440 of that $1,600 outside the calendar quarter in which the claimant's wages were the highest. 820 ILCS 405/500E. For example, if a claimant earned $1,600 over the four calendar quarters that constituted that claimant's base period, the claimant must not have earned any more than $1,160 in any one quarter. Otherwise, the claimant would not have satisfied section 500E's requirement that at least $440 be earned outside the calendar quarter in which the claimant earned the most wages.

[2] To illustrate, the following represents the base period of a claimant who filed for unemployment insurance in June 1993:

(Footnote continued on following page)

Illinois uses its base period scheme because it is a "wage record system" state. Under this system, employers covered by the IUIA report the gross wages of all their employees to the state unemployment security agency on a quarterly basis. Employers must report their employees' wages by the last day of the month following the quarter in which the wages were paid. As a result, IDES experiences peak periods that begin about one week prior to the end of the reporting month; the peak periods last about 3 to 8 weeks with an additional week to process delinquent reports. App. VII at 70-71 (Stipulated Facts). The gap created by the base period in section 237 of the IUIA (i.e., the gap between the end of a claimant's base period and the beginning of a claimant's benefit year) gives employers in a wage record system time to report wage information to the state agency and gives the state agency time to make that information available to local unemployment insurance offices. App. VII at 66-67.

Although a wage record system is the most common system in the United States, some states use a "wage request system," under which a state requests a claimant's wage information from the claimant's employer when the claimant files for unemployment benefits. Because a state agency under this system handles only wage information needed to adjudicate each particular claim, a state agency can request the most recent wage information for each claimant, thereby obviating the need for a substantial gap between the end of a claimant's base period and the beginning of a claimant's benefit year. App. VII at

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[2] *continued*

1st Quarter	(Jan.-Mar. 1992)	earnings considered
2nd Quarter	(Apr.-June 1992)	earnings considered
3rd Quarter	(July-Sept. 1992)	earnings considered
4th Quarter	(Oct.-Dec. 1992)	earnings considered
5th Quarter	(Jan.-Mar. 1993)	earnings not considered (lag quarter)
6th Quarter	(Apr.-June 1993)	earnings not considered (filing quarter)

67-68. Finally, some states move their base periods. Under this approach, when a claimant has insufficient qualifying wages in the first four of the last five completed quarters under an IUIA section 237-type base period, the state agency redetermines the claim based on wages earned in the four completed calendar quarters immediately preceding the filing quarter. App. VII at 68.

B. *Luella Pennington*

Luella Pennington is the class representative for the unemployment insurance claimants. She filed a claim with IDES for unemployment insurance on June 7, 1984, the second quarter of 1984. Under IUIA section 237, Ms. Pennington's base period was January 1, 1983 to December 31, 1983, the four calendar quarters of 1983. Because Ms. Pennington had not earned sufficient qualifying wages in her section 237 base period, IDES denied her application. Ms. Pennington remained unemployed and therefore filed a second claim on October 5, 1984, the fourth quarter of 1984. Her base period for this application encompassed the third and fourth quarters of 1983, and the first and second quarters of 1984. She was entitled to benefits this time because she had earned enough section 500E qualifying wages in the first two quarters of 1984.

Section 237's base period required Ms. Pennington to wait until October 5, 1984 to claim benefits. If IDES had considered lag quarters in determining qualifying wages, Ms. Pennington could have successfully refiled on July 2, 1984, the third quarter of 1984, because IDES would have considered the first two quarters of 1984 in determining her qualifying wages. Instead, she had to wait to file in October 1984, the fourth quarter of 1984, in order to have both the first and second quarters of 1984 considered as qualifying wages under the section 237 base period. Ms. Pennington therefore brought a § 1983 action against IDES on behalf of herself and all others similarly situated alleging that section 237's base period violates the "when due" clause of the SSA. The plaintiff class's first complaint

alleged that it was "administratively feasible," 20 C.F.R. § 640.3(a), for IDES to include as the four-quarter base period both the lag quarter and, if necessary, the filing quarter. The class's second amended complaint, however, alleges only that it would be administratively feasible for IDES to consider the lag quarter in calculating a claimant's qualifying wages, thus making the base period the four calendar quarters immediately preceding the filing quarter.

C. *District Court Proceedings*

IDES moved to dismiss the plaintiff class's complaint and moved for summary judgment. One of IDES's main arguments was that section 237 is not an administrative method subject to the "when due" clause, but rather is an eligibility provision, which Congress left the states to determine. Section 237, IDES submitted, is a monetary eligibility provision which defines the class of claimants to whom payments are due. Because Ms. Pennington and the plaintiff class had insufficient qualifying wages under section 237, they were not "due" anything. IDES thus claimed that the "when due" provision was inapplicable because it applies only after a claimant has been deemed eligible for benefits under state law. The district court denied IDES's motions, as well as its motion to reconsider. In its June 13, 1989 Memorandum Opinion and Order, the court relied on *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and stated that the "when due" clause requires prompt determination of eligibility as well as prompt payment of benefits to eligible claimants. June 13, 1989 Mem. Op. at 7-8.

The case proceeded to a bench trial in October 1990. Although the parties stipulated to many facts, procedures, and issues, each side presented evidence concerning the "administrative feasibility" of implementing an alternative

base period definition.[3] In an October 21, 1992 Memorandum Opinion and Order, issued two years after the bench

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[3] The plaintiff class's expert witness, Peter Kauffman, conceded that, based on the speed of claim processing, the control of fraud, and the cost of administration, the wage record system which IDES currently uses is a better method than the wage request system. However, Kauffman testified that there existed an administratively feasible method, which he termed "Alternative I," by which IDES could minimize the delay caused by section 237's base period. The heart of Alternative I consists of using a movable base period on a limited basis. Whenever a claimant lacked sufficient qualifying wages in the section 237 base period, IDES could make a determination of a claimant's qualifying wages based on the wages a claimant earned in the lag quarter. Thus, Alternative I's base period for claimants with insufficient wages in the section 237 base period would be a moved base period comprised of the four calendar quarters immediately preceding the filing quarter (i.e., the second, third, and fourth quarters of the section 237 base period plus the lag quarter).

Because employers need report their employees' wages only by the last day of the month following the quarter in which the wages were paid, a claimant's lag quarter wages will not always be posted in the first few weeks of the claimant's filing quarter. (Kauffman's study found that 16% of a completed quarter's wage data is processed and available by the end of the fourth week of the following quarter; 73% is available at the end of the eighth week.) Under Alternative I, therefore, when a claimant files who does not have sufficient qualifying wages in the claimant's section 237 base period, IDES first would run a "threshold" test using the wage information from the second, third, and fourth quarters of the section 237 base period. If the claimant had not earned at least $440 in those three quarters, the claimant would be ineligible by statute for benefits regardless how much the claimant earned in the lag quarter. *See supra* note 1 (discussing monetary eligibility requirements of IUIA section 500E). According to Kauffman, this threshold test would eliminate two-thirds of those without qualifying wages under section 237 from further consideration. If a claimant's lag quarter wages were not processed and available, and that claimant passed the section 500E threshold test, IDES's computer would issue a monetary finding as soon as the lag quarter wages were posted. Of course, for those claimants whose lag quarter wages were posted when they filed their claim and who did not have

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[3] *continued*

sufficient qualifying wages under section 237, IDES's computer would issue a second finding of eligibility on the basis of the movable base period comprised of the four completed calendar quarters preceding the filing quarter. Under Alternative I, those claimants who had sufficient qualifying wages in the four quarters preceding the filing quarter would receive unemployment insurance benefits retroactive to their initial claim.

Kauffman also set out in his testimony two other possible methods. "Alternative II" would consist of speeding administration of Alternative I by sending wage requests to employers of claimants who applied in the first month of the filing quarter, whose lag quarter wages were not posted at application time, and who passed the threshold test. "Alternative III" would do the same for all such claimants, not just those who applied in the first month of the filing quarter. Kauffman testified that the marginal expense of these two alternatives, in comparison with Alternative I, exceeded their marginal benefits.

Both the plaintiff class and IDES presented evidence on the costs of implementing the movable base period of Kauffman's Alternative I. Kauffman testified that only one additional IDES staff person would be necessary to execute Alternative I. In addition, Kauffman stated that one-time computer conversion costs would be $50,000 for equipment and $40,000 for one computer programmer's compensation. IDES's expert witness, on the other hand, Michael Marshman, estimated that the cost of computer conversion under Alternative I would run approximately $2 million. Melissa Barton, manager of IDES's computer, estimated that computer conversion would run about $1.7 million and that IDES would need to employ three or four additional programmers.

Finally, both sides stipulated that, in 1986, 526,469 claimants filed unemployment benefits applications with IDES. IDES denied 63,518 claimants benefits because they lacked qualifying wages; however, 15,034 of those denied would have had sufficient qualifying wages if IDES had counted the wages they had earned in the lag quarter, as would be the case under the plaintiff class's Alternative I. Moreover, an additional 9,115 claimants would not have been denied benefits in 1986 if section 237's base period included the wages they had earned in their filing quarters. Under Alternative I, which includes lag quarter wages, these claimants could have filed a valid claim for benefits three months sooner than under the section 237 base period. *See* App. VII at 66 (Stipulated Facts).

trial, the district court handed down its judgment in favor of IDES. However, instead of assessing the evidence at trial and making express findings of fact on the issue of administrative feasibility, the district court reversed its earlier decisions and ruled that section 237 was an eligibility requirement. As such, the district court held that IDES was entitled to judgment as a matter of law. The court reasoned that claimants who do not have sufficient qualifying wages under section 237's base period, but who would if lag quarter wages were included in IDES's determination, do not experience any "delay" in receiving benefits because those benefits are not "due." Mem. Op. at 12. Rather, such claimants are "simply ineligible" for benefits at the time they apply. Mem. Op. at 11. Thus, according to the district court, section 237 is not an administrative method subject to the "when due" clause of section 303(a)(1) of the SSA, but rather a "valid eligibility" provision, the content of which Congress has left to the states. The district court, however, did not end its discussion at that point. Although it had already held as a matter of law that section 237 was not subject to the "when due" clause, the district court proceeded to make a brief determination of whether the delay section 237's base period creates is justifiable under the "when due" clause. The court stated that, because section 237's base period did not create an "infinite delay," *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982), section 237 did not violate the "when due" clause or any corresponding regulations. Oct. 21, 1992 Mem. Op. at 15.

II

ANALYSIS

On appeal, we must determine de novo whether the definition of base period in IUIA section 237 is an administrative method subject to the "when due" clause of the SSA and its corresponding regulations, or whether it is an eligibility provision and thus beyond the reach of the

"when due" clause.[4] If we determine that section 237's base period is an administrative method, we must weigh the burdens and benefits of section 237 against the burdens and benefits of the plaintiff class's proposed movable base period to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

A. *Section 237: Eligibility Provision or Administrative Method?*

1.

At the outset, we must address an initial argument of IDES, and of the Secretary of Labor as amicus curiae in support of IDES. IDES submits that, because a federal court lacks the authority to rewrite a state statute such as IUIA in granting an injunctive remedy, we therefore cannot grant relief to the plaintiff class in this case. IDES acknowledges that a federal court can enjoin the practice or use of a state statutory provision that violates the "when due" clause. *See, e.g., California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 135 (1971) (enjoining California statute which provided for the withholding of insurance benefits upon an employer's appeal from the initial eligibility determination because it violated the "when due" clause). However, IDES argues that the plaintiff class's suit seeking to enjoin IUIA section 237 as applied to the class should be dismissed because the relief the class seeks

[4] The plaintiff class concedes that valid state eligibility requirements, such as "voluntary leaving," 820 ILCS 405/601, are not subject to the SSA's "when due" clause. Appellants' Br. at 25 ("[A] state does not violate the 'when due' clause by delaying payment of benefits to enforce provisions that govern eligibility.") (citing 20 C.F.R. § 640.1(a)(2) (stating that "applicable federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law")); *see also Jenkins*, 691 F.2d at 1229 (stating that "the state has a legitimate interest in enforcing its valid eligibility criteria").

cannot be effected by merely enjoining section 237. Rather, IDES states that, because section 237 would remain in effect for the great majority of unemployment insurance claimants, the only remedy that would give the plaintiff class relief is the ordering of a special alternative base period. Such equitable relief, IDES contends, is an inappropriate remedy to impose on a sovereign state. *Cf. Jenkins*, 691 F.2d at 1234 (ordering the district court to enjoin the IUIA provision at issue but to do so in a judgment that "does not specify the exact measures that the state must take to bring itself into compliance with the law").

We cannot accept this argument. Although it is doubtless true that a federal court lacks the authority to rewrite IUIA section 237 for the Illinois General Assembly, relief can be granted to the plaintiff class in this case without doing so. Although the plaintiff class has tendered an alternative base period system, the remedial options open to the district court are not limited to entering an injunction ordering IDES to implement that alternative base period. Indeed, the plaintiff class does not even urge that such relief be granted. Rather, the proposed alternative base period is merely the plaintiff class's illustration that section 237's base period, as applied to the plaintiff class, violates the timeliness directive of the "when due" clause because a more prompt method of determining qualifying wages is administratively feasible. Thus, if it is determined that section 237 is an administrative provision and not an eligibility requirement, and if it is determined that there exists an administratively feasible alternative method by which to determine qualifying wages more promptly, the appropriate remedy will consist only of enjoining section 237 as applied to the plaintiff class. Because "the state should be permitted to decide, in the first instance, how [section 237] can be altered to comply with section 303(a) of the Social Security Act," it would be in the hands of the state to implement "the exact measures that the state must take to bring itself into compliance with the law." *Id.*

2.

The Secretary of Labor, appearing in this court as amicus curiae, notes at the outset of his presentation that it is clear that Congress intended that the states have "free rein" in designing the eligibility criteria for their respective unemployment programs. This statement is undoubtedly true. *See New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539 (1979) (plurality opinion) (stating that "Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria"); *Jenkins*, 691 F.2d at 1232 (acknowledging "the state's competing interest in enforcing its eligibility criteria, the validity of which is not questioned"). Nevertheless, this truism simply begs the question and, consequently, contributes nothing to the inquiry before us. Rather, we must address an antecedent issue—whether IUIA section 237 is an eligibility requirement rather than an administrative matter subject to the "when due" clause.

The Secretary argues that, because Congress noted the existence of lag periods while attempting to remedy the problem of so-called "double dipping," we ought to conclude that Congress determined that such periods are indeed acceptable. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845-46 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' ") (citation omitted). We do not believe that it is appropriate to read such a determination into Congress' selection of another remedy for that problem. Congress' decision to deal with the so-called "double dipping" problem by requiring intervening work rather than abolishing lag periods cannot fairly be characterized as a focused congressional examination of the problem before us in this litigation. Consequently, that decision does not counsel us to conclude that Congress has revisited this area and declined consciously

to address the problem that the litigants are now addressing in this litigation. Indeed, the provision upon which the Secretary relies amended the Federal Unemployment Insurance Tax Act, 26 U.S.C. §§ 3301 *et seq.* The legislation had nothing to do with the operation of the "when due" clause and certainly did not address the issue of whether the type of base periods used in the Illinois statute violated that clause. When there is no indication that Congress has focused on the matter, legislative silence is indeed a very poor guide to the discernment of legislative intent. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

The Secretary also reminds us that we are obliged to defer to the interpretation given a statute by the agency charged with the responsibility for administering it so long as the agency's interpretation of the statute is based upon a permissible reading of that statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *accord National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). Our cases certainly demonstrate loyal adherence to that principle. *See, e.g., Hanson v. Espy*, 8 F.3d 469, 472-73 (7th Cir. 1993); *United States v. Baxter Health Care Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 906-07 (7th Cir. 1990). Nevertheless, we have never interpreted this principle as a direction to approach our review of all government positions with a rubber stamp. For instance, along with the other circuits, we have distinguished between agency positions developed in the heat of litigation and those that reflect the deliberate attempt of the agency to implement the will of Congress through the regulatory process. *See, e.g., Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers*, 3 F.3d 994, 1003 (7th Cir. 1993) (declining to defer to agency's amicus brief when the agency had not issued any regulation or opinion on the subject because "[c]ourts do not defer to 'agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice' ") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)), *petition for cert. filed*, 62 U.S.L.W.

3378 (U.S. Nov. 12, 1993) (No. 93-768). Similarly, we have distinguished between those statements of legislative intent that the agency embodies in formal regulations[5] and that, consequently, have the benefit of careful crafting and comment, and those more informal statements that do not necessarily reflect the deliberate focus of the entire agency on the issue of congressional intent. *See, e.g., Doe v. Reivitz*, 830 F.2d 1441, 1446-47 (7th Cir. 1987) (stating that interpretive documents "are not entitled to the same degree of deference commanded by the high-powered regulations reviewed in *Chevron*"), *amended*, 842 F.2d 194 (7th Cir. 1988); *see also Hanson*, 8 F.3d at 472 n.3 (7th Cir. 1993) (noting same); *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 1360 (1993).

We are mindful of our obligation to defer to the interpretation of the agency whenever that interpretation can be said to embody a deliberate and considered interpretation of the legislative intent. We therefore have examined with great care the sources that, in the agency's view, evidence its longstanding view that issues of lag periods are matters of eligibility and therefore are not subject to the "when due" clause and, indeed, are within the exclusive responsibility of the states. At the outset, we think it is important to note that the Secretary does not invite our attention to any instance in which, by formal regulation, the agency has squarely stated that the length of lag periods is a matter of eligibility within the exclusive authority of the states. Certainly, the simple definitional section for "base period" defines that period as "the period as determined under the applicable state law for the individual's applicable benefit year." 20 C.F.R. § 615.2(b). But this definition hardly qualifies as an explicit determination by the Secretary that lengthy lag periods are beyond the scope of the "when due" clause.

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[5] *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (noting that regulations issued by an agency under statutory authority have the force and effect of law).

The Secretary also submits that the position of the agency can be discerned from certain "draft bills" provided to the states at the time of the initial enactment of the legislation in 1937 and again in 1950. In support of its position, the agency stresses that these "drafts" were merely advisory in nature and that the accompanying explanation explicitly recognized that it was the right and the responsibility of the states to decide "what kind of legislation it desires and how it shall be drafted." We recognize that particular deference is due to an agency pronouncement that " 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently, and smoothly while they are yet untried and new.' " *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (citation omitted); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the case before us, however, it must be admitted that the "pronouncements" at issue are, to put it mildly, ambiguous evidence of the Secretary's interpretation. Although one of the drafts does include a lag period like the one in the present Illinois statute, by the Secretary's own admission, these "draft bills" were advisory in nature and hardly can be accorded the same weight as that given the formal regulations of the department. *See Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 485 (1977) (declining "to read implications of the draft bills into the Social Security Act").

These "draft bills" do not, moreover, directly address the issue here: whether the lag period arrangement can be termed a matter of eligibility as opposed to a matter of administration.[6] We are asked to imply that the general

[6] The Secretary has made use of the draft bills to demonstrate that a lag period such as IUIA section 237 is an eligibility provision and not an administrative method. However, we also note that, if such a lag period is an administrative method and not an eligibility provision, the mere fact that the draft bills take notice of a lag period similar to IUIA section 237 does not indicate that

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statement—that the state has the right to decide the contours of its own legislation—establishes that the agency regards the lag period as a matter of eligibility rather than an administrative matter. It must be remembered, however, that the states also have a great deal of latitude with respect to administrative matters, although that discretion is cabined somewhat by the strictures of the "when due" clause. One must read a great deal into the "draft bills" to determine that such a statement is a short hand for a definitive agency determination that the lag period issue is not subject to the "when due" clause.

An additional ambiguity in the Secretary's position must also be noted. If the matter of the lag periods is beyond the scope of the "when due" clause and therefore not a matter within the responsibility of the Secretary, it is difficult to understand why the agency found it necessary to devote such a great deal of effort to a matter not within its cognizance. As we have noted, the matter of lag times is addressed in the "draft bills." Again, in a 1962 policy statement, the agency addressed the matter and counseled the states agencies that lag periods ought to be as short as possible. While these agency utterances do not establish that the agency has treated lag periods as a matter of administration, they certainly cast a great deal of doubt on the proposition that the agency has taken the opposite position and consistently has treated the device as a matter of eligibility, the sole concern of the state. Absent definitive guidance from the Secretary, we must rely more heavily on the caselaw which has dealt with the issue, to which we now turn.

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[6] *continued*

that lag period is in compliance with the "when due" clause or the corresponding regulations. A state must pay unemployment benefits "with the greatest promptness that is administratively feasible." 29 C.F.R. § 640.3(a). Needless to say, what was "administratively feasible" when the draft bills were written—1937, 1950, and 1962—is much different from what is administratively feasible in today's technologically advanced world.

3.

The plaintiff class submits that several cases demonstrate section 237 to be an administrative provision. In *Fusari v. Steinberg*, 419 U.S. 379, 388 n.15 (1975), a district court had interpreted a prior Supreme Court summary affirmance in *Torres v. New York Department of Labor*, 405 U.S. 949 (1972), as standing for the proposition that "benefits are not 'due' under § 303 until administratively deemed payable." The Supreme Court stated that such an interpretation of the "when due" clause "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." *Fusari*, 419 U.S. at 388 n.15; *see also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) ("We find no merit in the Secretary's argument that the 'when due' requirement of § 303(a)(1) . . . does not apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits.").

The plaintiff class also relies on our decision in *Jenkins*, 691 F.2d at 1229, in which we relied on *Fusari* in rejecting the same argument IDES presents in this case, albeit in the context of a different section of the IUIA. The proviso at issue in *Jenkins* concerned eligibility decisions for unemployment insurance claimants who had allegedly been discharged because of a felony or theft in connection with the claimant's work. *Id.* at 1227. The proviso, IUIA section 602 B, stated that "the determination of [the affected claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings arising therefrom." *Id.* IDES argued that the "when due" clause did not apply to that proviso

> because benefits do not become due until the criminal charges are resolved; in [IDES's] view the held in abeyance proviso postpones the determination of eligibility, rather than the payment of benefits to eligible persons.

Id. at 1229. We rejected IDES's argument. We stated that it would unduly limit the "when due" clause to narrow

issues of payment mechanisms, thereby precluding the use of the clause as a means of effectuating the purposes of the SSA (i.e., prompt determination and payment of unemployment insurance to achieve "humane" and "macroeconomic" objectives). *Id.* The plaintiff class thus submits that *Jenkins* demonstrates that the "when due" clause requires prompt eligibility determinations, not just prompt payment of benefits. *See id.* ("We think Congress had larger objects in view than the ministerial competence of state comptrollers."). Moreover, the class asserts that *Jenkins* shows that IDES cannot make an end-run around a functional analysis of section 237 merely by labelling it an eligibility provision. Rather, section 237's purposes must be studied to determine whether it is subject to the "when due" clause.

The plaintiff class notes that, according to the Supreme Court, valid eligibility criteria "define the class of persons eligible for benefits." *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977). By contrast, the class maintains that section 237's base period does not define the class of eligible claimants. Instead of determining *what* earnings IDES will consider, section 237 determines *when* IDES will count those earnings as qualifying wages. This is demonstrated, the class asserts, by the fact that a claimant not yet eligible for benefits owing to section 237's lag quarter need only wait to become eligible in the future. By contrast, a claimant ineligible under a valid eligibility criterion, such as the IUIA "voluntary leaving" provision, must affirmatively rectify the situation by, in this example for instance, "becom[ing] reemployed and ha[ving] had earnings equal to or in excess of his weekly benefit amount in each of four calendar weeks." 820 ILCS 405/601. Finally, the plaintiff class states that both sides agree that valid eligibility criteria measure a claimant's "continued and current attachment to the labor force." *Fleiszig v. Board of Review*, 104 N.E.2d 818, 821 (Ill. 1952). However, the class submits that section 237's base period causes class members with relatively strong attachment to the work force to wait until that attach-

ment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over).

IDES submits that the district court correctly held that section 237 is a valid eligibility requirement beyond the reach of the "when due" clause and corresponding regulations, not an administrative method. In its view, the cases that have found state unemployment insurance provisions to conflict with the "when due" clause have all dealt with situations in which an initial determination of eligibility had been made, thus making payment in those cases "due" and hence subject to the "when due" clause. In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971), for example, the Court held that a California procedure which suspended payments for a median period of seven weeks pending administrative appeal violated the "when due" clause; however, the statute violated the prompt payment requirement "after an initial determination of eligibility." IDES attempts to distinguish *Fusari* on the grounds that each plaintiff in that case "had filed a valid initiating claim and received benefits for a period of time." *Fusari*, 419 U.S. at 382 n.3. IDES concedes that *Jenkins* stated that benefits cannot be delayed by postponing eligibility determinations; however, it contends that no delay in eligibility status has occurred, because claimants such as the plaintiff class are simply ineligible when they apply. Finally, like the plaintiff class, IDES submits that eligibility criteria measure attachment to the work force. Unlike the class, though, IDES submits that section 237's base period, like other eligibility criteria, aids in excluding those claimants with the most tenuous attachment to the work force.

Although IDES's contention concerning section 237's status as an eligibility provision is "not an absurd argument," *Jenkins*, 691 F.2d at 1229, we cannot accept it. First, IDES cannot persuasively distinguish *Jenkins*. In addressing the same argument in essentially the same context, we recognized in *Jenkins* that such an argument would

render the "when due" clause a virtual nullity, limiting it to those cases "where the state concedes that unemployment is due someone and simply fails to establish administrative mechanisms that result in paying him within a reasonable time." *Id.*; *see also Fusari*, 419 U.S. at 388 n.15 (stating that this argument "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits"). If the content of the "when due" clause were so eviscerated, "a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide." *Jenkins*, 691 F.2d at 1229. As we stated in *Jenkins*, we believe that Congress had larger purposes for the clause in mind.

In the same vein, the Secretary as amicus curiae asserts that *Jenkins* is inapposite because an initial determination of eligibility had already been made in that case, which thus implicated the "when due" clause.[7] The proviso at

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[7] We recognize that in some of the relevant cases the state agency at issue had made an initial determination of eligibility and that payment was therefore "due." *See, e.g.*, *Java*, 402 U.S. at 133 (holding that the "when due" clause was violated by lengthy delay in administrative appeal "after an initial determination of eligibility ha[d] been made"). In *Fusari*, however, the Supreme Court indicated that its decision in *Java* did not turn on the fact that only payments, and not eligibility, were suspended by the effect of the statute at issue in that case. Rather, *Fusari* rejected the conclusion of the district court in its case that, because a claimant who had initially been determined eligible subsequently had been deemed ineligible, payments were no longer "due" under the "when due" clause. The Court stated that "[s]uch a definition of the 'when due' requirement of federal law would leave little vitality to *Java*." *Fusari*, 419 U.S. at 388 n.15.

Although no Supreme Court case has addressed the applicability of the "when due" clause when no initial determination of eligibility has been made, the Third Circuit was presented with such a scenario in *Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980). In that case, the Secretary of Labor tried to distinguish *Fusari* on the basis that "the claimant had at least received an initial ad-

(Footnote continued on following page)

issue in *Jenkins*—the "held in abeyance" proviso—expressly stated that "a determination of [a claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings." *Id.* at 1227. In *Jenkins*, therefore, no initial determination of benefits had been made and no payments were "due" in the sense that IDES urges on us in this case. We nonetheless held that the provision at issue was subject to and, indeed, violated the "when due" clause. Similarly, we now hold that section 237 is subject to the "when due" clause.

Second, IDES argues at length that section 237 functions as a measurement of each claimant's attachment to the work force. IDES submits that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement. *See supra* note 4. However, IDES has conceded in more than one place that the gap created by section 237's base period, in which a claimant's lag quarter wages are not reported, "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. VII at 67 (Stipulated Facts); *see also* Appellee's Br. at 42 (stating that "[s]ection 237's base period facilitates the State's utilization of wage recording"). In other words, section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system. In a world of high-speed information exchange, the lag quarter

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[7] *continued*

ministrative determination of eligibility for unemployment compensation benefits." *Id.* at 661 n.14. The Secretary argued "that where a claimant has never been determined eligible, the 'when due' requirement is inapplicable." *Id.* The court rejected the Secretary's argument, stating that the Secretary's "conclusion would no less nullify the 'vitality' of *Java* than the conclusion of the *Fusari* district court." *Id.*

would not exist; yet an eligibility requirement like the "voluntary leaving" provision would. *See* 820 ILCS 405/601. We therefore hold that section 237 is an administrative provision and, as such, is subject to the timeliness requirements of the "when due" clause.

B. *Whether Section 237 Violates the "When Due" Clause*

The next analytical step is to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). To do so, it is necessary to decide whether section 237's base period "strikes a reasonable balance" between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims. *Jenkins*, 691 F.2d at 1230, 1233.

As a "statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility," assessing section 237 "inevitably will generate fact-specific applications." *Fusari*, 419 U.S. at 388 n.15. Unfortunately, however, because the district court entered judgment for IDES as a matter of law, it made practically no helpful factual findings from the week-long trial it conducted.[8]

[8] The only findings the district court made that could be said to be factual stemmed from its determination that section 237 does not present an "indefinite delay" to unemployment insurance claimants. Mem. Op. at 15. The court engaged in this determination despite the fact that it had already held as a matter of law that section 237 was an eligibility provision not subject to the "when due" clause. For reasons difficult to discern, the district court treated dicta set forth in *Jenkins* (in the context of discussing a state's obligation to make prompt eligibility determinations) as establishing a legal standard. *Jenkins* stated that "[the claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment." *Jenkins*, 691 F.2d at

(Footnote continued on following page)

Because this court is not the proper forum in which to engage in factual findings, we must remand this case to the district court. In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court decided to resolve whether a certain Ohio statute conflicted with the "when due" clause even though the district court had not dealt with the issue, much less made any findings of fact. However, the Court did so because the resolution of that issue did not entail any findings of fact. The Court indicated that if findings of fact had been involved, it likely would have remanded the case to the district court. *Id.* We therefore believe that the proper course is to remand this case so that the district court can proceed to determine, on the evidence it has already taken and any new submissions from the parties, whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue.[9] The district court's sole task is to determine whether the current Illinois scheme is compatible with the "when due" clause. It is not its responsibility to mandate an alternative. If the district court should determine that the current Illinois scheme does not

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[8] *continued*
1229. The term "indefinitely" only made the point that states are required under the "when due" clause not only to make prompt payment of benefits, but also to make eligibility determinations promptly; it was not a new legal standard for examining eligibility criteria.

[9] We have held as a matter of law that lag periods such as IUIA section 237 are administrative methods and not eligibility provisions, and as such are subject to the strictures of the "when due" clause. We note, however, that with respect to whether a given lag period is acceptable under the Secretary's regulations—specifically, whether it reasonably insures payment of benefits "with the greatest promptness administratively feasible," 29 C.F.R. § 640.3(a)—the Secretary has the authority to issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations.

comply with the "when due" clause—a determination upon which we emphatically express no opinion—it will be the prerogative of Illinois, not the district court, to determine the alternative.

Conclusion

For the foregoing reasons, we reverse the decision of the district court that section 237 is an eligibility provision as a matter of law. We hold that section 237 is an administrative method subject to the strictures of the "when due" clause of the Social Security Act. We therefore remand this case to the district court for factual findings and a determination of the issue of section 237's compliance with the "when due" clause and corresponding regulations.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1994.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellant,

No. 92-3725 v.

LOLETA DIDRICKSON*, Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—Paul E. Plunkett, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on May 16, 1994 by

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

defendant-appellee, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Case Number: 85 C 6327

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

Date October 21, 1992

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

App. 28

[Dated October 21, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Luella Pennington, individually and on behalf of a class of applicants for Illinois unemployment insurance benefits, challenges the constitutionality of section 237 of the Illinois Unemployment Compensation Act ("IUCA"), Ill. Rev. Stat. ch. 48, ¶ 347 (1986). In that section, Illinois defines the "base period" used to determine whether a claimant is eligible for benefits as earnings during the "first four of the last five quarters."[1] This definition excludes from

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[1] Paragraph 347 states, in pertinent part, "For each benefit year beginning on or after November 1, 1981, 'base period' means the first four of the last five completed calendar quarters immediately preceding the benefit year." Ill. Rev. Stat. ch. 48, ¶ 347 (1986). "Calendar quarter" is defined as "the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31, or the equivalent thereof as the Director may by regulation prescribe." Ill. Rev. Stat. ch. 48, ¶ 348 (1986).

consideration earnings from the quarter immediately preceding the application. In Ms. Pennington's case, she could not meet the earnings levels required by the IUCA unless her earnings in the last quarter preceding her application were considered. Consequently, Ms. Pennington's application was denied, and she was required to wait an additional quarter and then to reapply. Upon re-application, Ms. Pennington was found eligible and was paid her unemployment benefits.

Ms. Pennington claims that Illinois, by using a base period of the first four of the last five quarters, violates a federal mandate requiring promptness in both eligibility determinations and benefits payments. Ms. Pennington asks for herself and others adversely affected that the Illinois base period be found unconstitutional under the Supremacy Clause of the United States Constitution.[2]

This Court held a week-long trial on the issue, and this Opinion will incorporate factual findings from that trial where appropriate.

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[2] The Supreme Court recently discussed the Supremacy Clause analysis in *Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 112 S. Ct. 2608 (1992):

> Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since our decision in *M'Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

112 S. Ct. at 2617.

The Social Security Act

As Judge Posner explained in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), the federal government, which partially funds the state unemployment compensation system, has "attached some strings to its largesse." *Id.* at 1226. Under section 303(a)(1) of the Social Security Act, the Secretary of Labor is required to make certain that a state's unemployment insurance law has methods of administration "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1) (1988). The regulations issued by the Secretary require "prompt determination of eligibility" and administrative methods that "will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible" and that are "reasonably calculated to insure full payment of unemployment compensation when due." 20 C.F.R. §§ 640.1(1)(2), 640.3(a), 650.1(b). Thus, the federal government, in return for footing part of the bill, requires the state to (a) determine eligibility promptly, and (b) pay full benefits promptly after that determination—as a mandate roughly akin to the notion of all deliberate speed.

Conversely, the Social Security Act and its regulations do not dictate or attempt to control the state's eligibility requirements. *Ohio Bureau of Employment Sec. v. Hodory*, 431 U.S. 471, 486-87 (1977). In *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court noted, "[T]he voluminous history of the Social Security Act [makes] it abundantly clear that Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." Consequently, a state has the exclusive and unfettered right to determine who receives benefits and how much those benefits will be without interference

from the federal government. The state must only make its eligibility determination and its benefit payments promptly.

The Illinois Unemployment Compensation Scheme

Illinois has developed a statutory scheme to determine eligibility for benefits which rests on two pillars—wage reporting and a certain minimum amount of earnings during a "base period." A similar scheme is utilized by approximately forty other states. According to the facts undisputed by the parties, under Illinois' wage reporting system, each employer within the state is required to report the wages paid to employees in each calendar quarter. That report must be filed within thirty days of the end of each quarter.[3] The employer's report is then incorporated into Illinois' computer system—a process which takes approximately two weeks. Thus, assuming a timely filing by the employer and normal administrative action by the state, an employee's earnings for any particular quarter are available to the Illinois unemployment offices six weeks after the end of that quarter. The earnings information is the basis from which the state is able to verify an applicant's eligibility for benefits.

To be monetarily eligible for unemployment benefits in Illinois, a claimant must have earned a minimum of $1,600 during the first four calendar quarters of the base period. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). The total of $1,600 must come from earnings in at least two of those

[3] Considering that some employers may be a few days late and that a few days may be needed for mail delivery as well, in some cases Illinois may not be in possession of the reports for approximately forty days.

four quarters and at least $440 must have been earned in a quarter other than the quarter with the greatest earnings. *Id.* For example, $440 in one quarter and $1,160 in another would meet the minimum eligibility requirements.

However, Illinois, in determining whether the claimant has the minimum earnings, has a base period of the "*first four of the last five quarters*" which precede the filing of the claim. Ill. Rev. Stat. ch. 48, ¶ 347 (1986). This is the provision which Ms. Pennington's class challenges. Under this scheme, an applicant who files in the sixth quarter is not entitled to have earnings from the fifth quarter counted in the determination of his or her monetary eligibility. The fifth quarter is referred to as the "lag quarter." Schematically, then, the base period looks like this:

Base Period

1st Quarter	—	earnings considered
2nd Quarter	—	earnings considered
3rd Quarter	—	earnings considered
4th Quarter	—	earnings considered
5th Quarter	—	lag quarter (earnings not considered)
6th Quarter	—	claim filed

Thus, if a claimant had earned nothing in the first two quarters, $440 in the third quarter and $1,160 in the fourth quarter, he would be eligible if he applied for benefits in the sixth quarter. Similarly, if a claimant had earned $440 in the third quarter, $1,160 in the fourth and a significant amount in the fifth, he would still be eligible. However, if the claimant had earned nothing in the first, second, and third quarters, $600 in the fourth, and $2,000 in the fifth quarter, he would be ineligible if he applied

in the sixth quarter. He would remain ineligible until he refiled in the next (or seventh) quarter, when the sixth quarter would become the "lag quarter" as follows:

	Base Period	
1st Quarter[4]	—	$0
2nd Quarter	—	$0
3rd Quarter	—	$0
4th Quarter	—	$600
5th Quarter	—	$2,000
6th Quarter	—	lag quarter (ineligible for benefits)
7th Quarter	—	claim filed

Approximately three percent of the claimants for unemployment benefits in Illinois are ineligible for benefits using the first four of the last five quarters but would be eligible if earnings from the fifth quarter (the "lag quarter" immediately preceding the filing of their claim) were counted.[5] The plaintiff class claims that the Illinois base period, by excluding earnings from the "lag quarter," requires many claimants to wait an unreasonable period of time before

[4] Under Illinois' definition of base period, of course, this first quarter would not be counted, as it is not one of the last five quarters before the benefit year. *See* Ill. Rev. Stat. ch. 48, ¶ 347 (1986).

[5] At trial, we considered the claims in 1985. The evidence presented showed that in that year, out of some 195,000 claims for unemployment compensation, approximately 15,000 were by individuals who needed their earnings from the immediately preceding quarter to be eligible for benefits. All were found ineligible at the time of their initial application. Some 8,000 reapplied in the following quarter and obtained benefits.

obtaining benefits for which they were actually eligible at the time of their initial application.

Under the Illinois scheme, the length of the delay an applicant experiences in receiving benefits depends upon when his or her claim is filed. If the claim is made early in the sixth quarter, the delay might be a full ninety days. If the claim is made at the end of the sixth quarter, the delay might be less than a week. From the evidence adduced at trial, it appears that the average delay is approximately six weeks.

Part of the delay is inevitable under Illinois' wage-reporting system because of the administrative time the state needs to compile and process the necessary information. If the fifth quarter earnings are needed to determine eligibility, the state must wait for the employers' reports, which are not due until thirty days after the quarter ends. Further, the state requires two additional weeks after receipt of the reports to process them into the state-wide computer system. Viewed in this light, a minimum time period in the sixth quarter of approximately forty-five days (or about six weeks) is required for Illinois to verify eligibility even if fifth quarter earnings are counted.

Thus, earnings for members of the plaintiff class who file in the second half of the sixth quarter would be reported and available on the state's computer system at the time the class members initially applied for benefits. Thus, the state should require minimal additional administrative time to process their claims. Nevertheless, these applicants (as well those who applied earlier in the quarter) are all required to wait and reapply at the beginning of the seventh quarter. As developed at trial, claimants who need the earnings from the lag quarter in order to meeting the required earnings levels experience an average

delay of four weeks before they become eligible for benefits.[6] Ms. Pennington claims this delay violates the Social Security Act's requirements of prompt determination of eligibility and payment of benefits.

Eligibility Requirement or Unreasonable Delay?

Defendant Sally Ward, Director of the Illinois Department of Employment Security, argues that the so-called "delay" in determining eligibility and receipt of payment is no such thing. Rather, in the state's view, Ms. Pennington and claimants similarly situated are simply ineligible when they apply during the sixth quarter. Thus, there is no delay in "determining eligibility," which is what § 303(a)(1) prohibits. There is also no delay in paying benefits when due because benefits do not become due until the claimant files a new application in the next quarter. Put another way, the Director contends that the Illinois base period is a legitimate eligibility requirement which defines the earnings considered in determining whether benefits are due. States are free to create their own unemployment compensation plans and to define their own eligibility requirements. *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977); *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982). According to Ms. Ward, Illinois has chosen to use the first four the last five quarters as its base period to determine eligibility. Since this is an eligibility requirement (just like the $1,600 in wages), the state is free to use any yardstick it wishes.

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[6] We conclude that the average delay is four weeks based on the proposition that one-half of the claimants would apply on the fiftieth day of the sixth quarter. The remaining half would apply over the next forty days of the quarter.

Ms. Pennington disagrees. She maintains that the base period is not an eligibility requirement at all. Instead, she argues that eligibility turns on earnings of $1,600 in a span of four quarters, at least $440 of which must have been earned in a quarter other than the quarter with the greatest earnings. Thus, a base period which does not permit a claimant to count earnings from the final quarter preceding his claim is simply a method of delaying the determination of eligibility. Ms. Pennington points out that at the time of her claim for benefits, she had done everything else necessary to receive benefits. She had earned the statutorily required amount, but because part of it came in the "lag quarter," she was required to wait approximately forty-five days and then to reapply for benefits. In essence, she argues, the base period which pretends to define eligibility in reality acts to delay the eligibility determination. Consequently, Ms. Pennington argues, Illinois' base period is a "wolf in sheep's clothing."

To resolve this issue, we must determine whether the Illinois base period, with its lag quarter, is a true eligibility requirement. If so, the Director must prevail, because Congress has left eligibility requirements to the sound discretion of the states. In *Ohio Bureau of Employment Security v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court concluded that "[n]othing in *Java*[7] purported to define the class of persons eligible for benefits. The Court's sole concern there was with the treatment of those who had already been determined under state law to be eligible." And in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court found that, "Congress intended the several

[7] *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

states to have broad freedom in setting up the types of unemployment compensation that they wish." Our own circuit in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), has recognized that the claimant must meet the state's eligibility criteria. *Id.* at 1229.

Illinois has established several eligibility requirements. The claimant must have earned a minimum of $1,600 during the first four of the last five quarters preceding his application for benefits. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). At least $440 of the $1,600 must have been earned in a quarter other than the quarter with the largest amount of earnings. *Id.* These requirements, among others, establish who is eligible to receive benefits.[8] *See, e.g.*, Ill. Rev. Stat. ch. 48, ¶ 403, 420 (1986).

We conclude that the lag quarter is in fact a valid eligibility requirement. Ms. Pennington, who applied for benefits in the sixth quarter and who needed to include her earnings from the fifth or "lag" quarter to qualify, was simply ineligible for benefits at the time of her application. There is no dispute that Ms. Pennington and claimants similarly situated are promptly found to be ineligible when they apply for benefits during the "lag quarter." They are advised that they may reapply in the next quarter and at that time, if they are still out of work, their benefits are promptly found to be due and are promptly paid. Viewed in this light, computing the earnings necessary for eligibility based on the "first four of the last five

[8] Illinois has also established a number of bases for disqualification of an otherwise eligible claimant, including, among other things, voluntarily leaving employment, discharge for misconduct, refusal of work, unemployment due to a labor dispute, receipt of other unemployment benefits and receipt of workers compensation benefits. *See* Ill. Rev. Stat. ch. 48, ¶¶ 431-36 (1986).

quarters" is an eligibility requirement which Illinois may properly utilize in its discretion.

The lag quarter, as an eligibility requirement, does not result in a delay in the payment of benefits to which a claimant is in fact entitled. When a claimant applies in the sixth quarter, he or she is not entitled to the retroactive payment of any past benefits based on the first, invalid application; he or she is entitled only to benefits from the time of the second, valid claim. In the event the claimant finds work between filing the first application during the "lag quarter" and the beginning of the following quarter, he or she will be unable to claim any benefits at all. There is no delay in either the determination of benefits or payment of benefits when due.

Under this analysis, *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and *California Department of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), are inapposite. In both cases, the state had made an initial determination that the claimant was eligible (in *Java* at a preliminary hearing[9] and in *Jenkins* at the time of application[10]), but the claimant was subsequently disqualified. Consequently, otherwise eligible claimants had to wait for the completion of other proceedings, causing an indefinite delay or interruption in their receipt of benefits, to see if their eligibility for those benefits was permanently lost. Here, in contrast, Ms. Pennington and similarly situated applicants are simply ineligible when they make their initial applications.

Ms. Pennington argues that this is a distinction without a difference. She points out that in both *Jenkins* and

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[9] 402 U.S. at 127-28.

[10] 691 F.2d at 1229.

Java, the state legislatures could have written the challenged provisions of the statutes to provide that when an additional procedure is required to determine eligibility, the claimant is simply denied benefits until the claims are finally resolved. However, we are not persuaded by this analysis. In *Jenkins*, the statute clearly provided that the eligibility was "held in abeyance pending the result of any legal proceedings arising therefrom." 691 F.2d at 1227. *See* Ill. Rev. Stat. ch. 48, ¶ 432(B) (1986). There, of the total number of claimants affected by the provision at issue, thirty-nine percent were later found to be eligible and were paid benefits retroactive to the date of their initial applications. *Id.* at 1229. This was the basis of the Seventh Circuit's finding in *Jenkins* that the disputed provision constituted an unjustified delay. Here, by definition, no claimant is even eligible in the sixth quarter if he must include fifth quarter earnings in order to meet the earnings levels requirement. This distinction is a substantive difference.

We recognize that the Illinois base period (with its lag quarter) results in a delay in the payment of benefits for those claimants who (1) need earnings from the lag quarter to qualify, and (2) remain unemployed until the following quarter. That delay can be as short as a few days or as long as three months. So we must consider whether the delay is administratively justifiable. In *Jenkins*, Judge Posner wrote:

> Of course [a claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment.
>
> . . . .
>
> If Illinois had good reason to postpone the payment of benefits to these people, then bearing in mind that the state has a legitimate interest in enforcing its

> valid eligibility criteria and minimizing its administrative expenses, we would not regard section 303(a)(1)—which only requires administrative methods "reasonably calculated" to ensure prompt payment—as a bar to postponement. But postponement must not be unreasonable.

Jenkins, 691 F.2d at 1229. Since the delay which concerns us results from the inclusion of the lag quarter in the base period, we must look to the length of, and the reasons for, the lag quarter.

As discussed earlier, Illinois is a wage reporting state. Under the administrative procedure described above (*see supra* at 4-5), Illinois needs about six weeks after the close of any quarter before it can verify an applicant's entitlement to benefits based in part on earnings in that quarter. Since Illinois has a legitimate interest in preventing ineligible individuals from receiving compensation, its use of the first six weeks of the quarter for verification is a legitimate administrative purpose. Consequently, the earliest time at which a claimant could expect payment would be after this administrative process has been completed, that is, during the last seven weeks of the quarter. The evidence presented at trial indicates that the class Ms. Pennington represents experiences an average delay of about four weeks after the state has completed its administrative process, or about ten weeks after the start of the quarter.[11]

We conclude that Illinois' inclusion of the lag quarter as an eligibility requirement does not violate the state's

[11] A member of the plaintiff class could file for benefits in the beginning, middle or end of the sixth quarter. Thus, one class member could experience a delay of eighty-nine days while another a delay of only a few days.

duty to ensure that payment is made as soon as "administratively feasible." *Java*, 402 U.S. at 121. A "lag" period has been part of Illinois' statutory scheme since 1955.[12] In fact, for claims beginning in November 1981, the "lag" period was shortened from "not less than four months" to one calendar quarter.[13] While the allowance of an entire quarter for administrative purposes does not reflect precisely the amount of administrative time the state actually needs at present, we find that it does not constitute an "indefinite delay." *See Jenkins*, 691 F.2d at 1229. It is undeniable that changes in technology since the current provision was enacted twelve years ago mean that, if Illinois had state-of-the-art computer hardware and software, it could process earnings information more quickly, but this fact does not render unreasonable the legislature's selection of one calendar quarter for administrative processing. We do recognize, however, that under certain circumstances an antiquated processing system could function so poorly as to create an unreasonable delay where reasonable alternatives exist. *See, e.g., Burtton v. Johnson*, 538 F.2d 765, 770 (7th Cir. 1976) (staffing and funding problems not satisfactory explanations of failure to make benefits payments promptly) (citing *Cornelius v. Minter*, 395 F. Supp. 616, 621 (D. Mass. 1974)). But the inclusion of the "lag quarter" as administratively necessary does not constitute such a circumstance.

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[12] *See* Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

[13] Previously, the base period for benefit years beginning prior to November 1, 1981 was "the four consecutive calendar quarters ending not less than four months nor more than six months prior to the month in which the benefit year began." Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

Conclusion

For the reasons set forth above, we hold that definition of "base period" set forth in section 237 of the Illinois Unemployment Compensation Act, Ill. Rev. Stat. ch. 48, ¶ 347 (1986), is a valid eligibility requirement for unemployment benefits and does not violate the Supremacy Clause of the United States Constitution. Consequently, we enter judgment in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

ENTER:

/s/ Paul E. Plunkett
United States District Judge

DATED: October 21, 1992

App. 43

[Dated August 7, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, et al.,

Plaintiffs,

v.

SALLY A. WARD,

Defendant.

No. 85 C 6327 — Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

1. *Motion to Reconsider*

Defendant seeks reconsideration of our Memorandum Opinion and Order of June 13, 1989 (hereafter "the Order"), in which we denied defendant's motion for summary judgment. The relevant facts are set forth in the Order and will not be described here.

Ms. Ward argues that we should have granted her motion for summary judgment. She characterizes the delays in payment of unemployment compensation complained of by plaintiffs as resulting from Illinois' method of determining the eligibility of claimants for initial entry into Illinois' unemployment insurance program. She argues that our ruling that such delays may violate the payment "when due" requirements of 42 U.S.C. § 503(a)(1) is erroneous because all previous cases concerning whether a

state unemployment compensation scheme violated the "when due" provision involved delays encountered after the claimants first met the state's threshold eligibility requirements. We disagree with defendant's analysis of plaintiffs' challenge to Illinois' unemployment compensation scheme and deny the motion to reconsider.

Illinois Rev. Stat. ch. 48, §§ 300 *et seq.*, require that a claimant for unemployment compensation must have earned certain minimum wages for insured work during a one year base period. Illinois treats the first four of the last five completed calendar quarters immediately preceding the benefit year as the base period. The statute requires that the claimant must have earned a minimum of $1,600 during the base period, at least $440 of which was earned outside the calendar quarter in the base period in which the wages earned were highest. Ill. Rev. Stat. ch. 48, § 420(e). Plaintiffs do not challenge the minimum earning requirements.

Rather, plaintiffs' complaint is with Illinois' method of determining the base period. Illinois will not consider wages earned in the calendar quarter in which the claimant files his claim (the "filing quarter") or in the preceding calendar quarter ("the lag quarter"). If a claimant can satisfy Illinois' eligibility requirements only by including lag quarter earnings, he is not considered "eligible" for benefits at that time. However, if he refiles the identical claim three months later, he is considered eligible. Meanwhile, all that has changed is the passage of time and not the amounts, sources, or dates of the claimant's earnings.

We disagree with defendant's argument that plaintiffs are challenging Illinois' eligibility requirements for unemployment compensation. We agree with the plaintiffs that, "the question is not *whether* the claimants 'met the threshold eligibility requirement . . . [of] sufficient base

period wages . . . ,' Def. Mem. at 1-2, but *when* [the Illinois Department of Employment Security] acknowledges that they have met that requirement." Plaintiff's Brief at 3-4. We therefore reaffirm our holding denying defendant's motion for summary judgment. Illinois may not postpone making a finding of eligibility by simply refusing to consider existing evidence until a later date, while acknowledging that once it is willing to consider this evidence the claimant will be eligible. We find that this is exactly the kind of delay which the Seventh Circuit held violated the "when due" provision in *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982) (the state may not take all the time in the world to decide that an unemployed person is entitled to compensation provided that it gets a check to him promptly once it has so decided.) *See* the Order at 7-8. Therefore, we refuse to consider our prior ruling.

2. *Motion for Certification*

Defendant also seeks certification to the Seventh Circuit of an interlocutory appeal under 28 U.S.C. § 1292(b). This section requires that we find that the Order (1) involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) that an immediate appeal will materially advance the ultimate termination of this litigation.

Defendant cites three "controlling questions of law" for interlocutory appeal. One question is whether this court can grant the relief sought by plaintiffs. As we discussed in the Order, a ruling on this issue is premature since plaintiffs may not prevail at trial on the merits and if they do we can only determine at that time, based upon the facts proved at trial, what relief is appropriate. Therefore, an immediate appeal on this issue will not material-

ly advance the ultimate termination of this litigation. The issue would not be ripe for appellate review until we had stated what specific remedy we were ordering. Prior to that time, the issue would be purely hypothetical. We also find that defendant has cited no cases to demonstrate that there is substantial ground for a difference of opinion on this question. The issue of remedy is not properly certifiable.

The second issue raised by defendant is whether plaintiffs have a private right of action for violations of 42 U.S.C. § 503(a)(1). We discussed this issue at length in the Order at 3-5. Defendant's brief in support of the motion to certify an interlocutory appeal cites no authority contrary to that cited in the Order. Therefore, we find that defendant has failed to show that there is substantial ground for difference of opinion on this issue and hold that it is not properly certifiable.

Finally, defendant argues that we should certify the issue of whether the "when due" clause applies to Illinois' eligibility requirements and the lag time involved in including previously earned wages in the base period. Defendant has not shown that there is substantial ground for a difference of opinion on this question. While defendant disagrees with our analysis of *Jenkins*, she cites no cases to show we have wrongly decided the question. The issue may be novel, but we do not believe that there is substantial ground for a difference of opinion.

In addition, we find that an interlocutory appeal will not materially advance this litigation. As plaintiffs note, discovery is complete and the trial is expected to take only a few days. Plaintiffs may be unable to show at trial that a shorter lag time between the earning of wages and their inclusion in the base period wage calculations is ad-

ministratively feasible, in which case defendant would prevail at trial. Therefore, an interlocutory appeal will not serve to substantially expedite resolution of this case, nor will it avert protracted proceedings or great expense. We hold that the requirements of § 1292(b) have not been satisfied.

Conclusion

Defendant's motion for reconsideration or for certification of an interlocutory appeal under 28 U.S.C. § 1292(b) of our Order of June 13, 1989, is denied.

ENTER:

/s/ Honorable Paul E. Plunkett
District Court Judge

Dated: August 7, 1989

[Dated June 13, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This suit is brought under 28 U.S.C. § 1983. It is a class action seeking relief for Illinois unemployment insurance beneficiaries based on the claim that the Illinois Unemployment Insurance Act ("IUIA"), Ill. Rev. Stat. Ch. 48, §§ 300 *et seq.*, as administered by the Illinois Department of Employment Security ("IDES"), violates Title III of the Social Security Act, 42 U.S.C. § 503(a)(1), which requires states to provide for "methods of administration . . . that are . . . reasonably calculated to insure full payment of unemployment compensation when due." The "when due" clause obligates states to pay benefits "with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

Plaintiffs argue that the threshold eligibility requirement for the receipt of unemployment benefits in Illinois violates the "when due" provision. Under the Illinois statute, to be monetarily eligible for unemployment compensation a claimant must have earned certain minimum amounts of wages for insured work during a "base period." The base period is defined as the first four of the last five completed calendar quarters immediately preceding the benefit year. IUIA § 327. Wages paid to the claimant in the last completed quarter ("processing quarter") and the quarter in which the claim is filed ("filing quarter") are not considered in determining the claimant's monetary eligibility. Hence, in some cases wages earned up to six months prior to the application for unemployment insurance will not be considered in determining eligibility for unemployment compensation. As a result, some claimants will need to wait several months and then reapply in order for their wages to be considered in the base period. Plaintiffs challenge this practice in violating the "when due" language of 42 U.S.C. § 503(a)(1).

Defendant has moved for summary judgment, arguing that: no private right of action exists under 28 U.S.C. § 1983 for enforcement of 42 U.S.C. § 503(a)(1); this court has no power to order relief since it may not rewrite an Illinois statute; the challenge to the base period does not raise any question of whether payments are made "when due"; and the named plaintiff is not a class member entitled to relief. For the reasons described below, we reject each of these arguments and deny the motion for summary judgment.

1. Private right of action.

Section 1983 provides a remedial cause of action to individual plaintiffs to redress violations of federal statutes

by state agents. *Wright v. Roanoke Redevelopment and Housing Authority*, 107 S.Ct. 766, 770 (1987). However, § 1983 is inapplicable "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Id.* The Supreme Court has held that § 1983 does provide a cause of action for a state deprivation of a federal statutory right unless *the state defendant shows* that " 'the remedial devices provided in [the federal statute] are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.' They [must] show that 'Congress specifically foreclosed a remedy under § 1983.' " *Id.* at 771 (citations omitted).

We find *Wright* analogous to this case. In *Wright*, the Court held that a private cause of action under § 1983 was available to the plaintiffs to enforce provisions of the federal Housing Act, where there was no legislative history indicating that exclusive enforcement of the statute was invested in the Department of Housing and Urban Development ("HUD") and the remedial mechanisms provided were not so comprehensive as to show that Congress intended to foreclose private actions for enforcement. The federal statute did not provide procedures for individuals to complain to HUD about violations or to bring violations to HUD's attention. The Court therefore held that a § 1983 action could be brought to enforce the Housing Act provisions.

Similarly, here, the federal statute, 42 U.S.C. § 500 *et seq.*, makes no provision for individuals to complain to the Department of Labor about violations. *Cf. Middlesex Cty. Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981) (no remedy under § 1983 where the federal statute gave express remedies to private plaintiffs to sue

for injunctions to enforce the statute). Further, the remedial devices provided in the statute are not so comprehensive as to demonstrate congressional intent to preclude a remedy under § 1983. The only remedy provided is that the Secretary of Labor "shall make no certification for payment to any state unless . . ." they comply with the statutory requirements. 42 U.S.C. § 503(a). This is a drastic remedy and one likely to be rarely employed. No other remedial provisions are contained in the statute. In *Rosado v. Wyman*, 397 U.S. 397, 421 (1970) the Supreme Court held,

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the State in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.

Further, defendant has failed to produce any legislative history showing Congress intended to foreclose private actions for enforcement. We think it clear that plaintiff's § 1983 cause of action has not been precluded.

We further note that a private right of action under § 1983 to enforce the federal unemployment compensation statute, 42 U.S.C. § 500 *et seq.*, has been found in other cases. *See California Human Resources Dept. v. Java*, 402 U.S. 121 (1971). *See also Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987) (private cause of action existed to enforce § 503(a)(3) requirement of a fair hearing); *Kelly v. Lopeman*, 680 F.Supp. 1101 (S.D. Ohio 1987) (same).

Defendant also argues that § 1983 is inapplicable because 42 U.S.C. § 503(a) does not create enforceable rights in

the plaintiffs. However, with respect to § 503(a), the Supreme Court has stated: "In addition to imposing restrictions on the fiscal administration of state unemployment compensation funds, [§ 503] establishes *specific procedural safeguards for benefit claimants.*" *Fusari v. Steinberg*, 419 U.S. 379, 384 n.4 (1975), *reh'g denied*, 420 U.S. 955 (1975) (emphasis added). This statement strongly suggests that the statute does create rights, in the form of procedural safeguards, for the claimants. These rights include the right to have procedures of administration designed "to insure full payment of unemployment compensation when due." We therefore hold that a private cause of action under § 1983 to enforce § 503(a) exists.

2. The power of this court to order relief.

While we agree with defendant that we may not write a new statute for Illinois if plaintiffs prevail on their claims, we do not think this entitles defendant to summary judgment. First, the issue of what remedy we *may* order *if* plaintiffs prevail appears premature to us. However, it seems clear to us that we do have the power to provide some remedy. For example, we could grant an injunction to plaintiffs and require the state to come up with a plan that will provide for speedier processing of claims, as in *Jenkins v. Bowling*, 691 F.2d 1225, 1228-1229 (7th Cir. 1982). There the court held:

> One might think the appropriate remedy for a violation [of the Social Security Act] was an order forbidding the Secretary to pay money to the noncomplying state for its unemployment-compensation program . . . or . . . an order forbidding the state to use federal money unless it conforms its unemployment insurance law to the requirements of the Social Security Act: Such a remedy was upheld in *Rosado v. Wyman*, 397 U.S. 397, 420-22 (1970), but is not what

> the plaintiffs want either. They just want the held in abeyance proviso enjoined.
>
> Despite the lack of any obvious basis in the language of [§§ 503] for such a remedy, the Supreme Court . . . has consistently assumed that it is a proper remedy . . . . We regard the point as too well settled to be questioned by us . . . . The result . . . makes a certain amount of practical sense in a case like this; it is unlikely that faced with a choice . . . between foregoing federal money or even abandoning section 602 B . . . Illinois would choose to forego the money.

The court went on to say that the state should be permitted to decide, in the first instance, how to alter the relevant provision of the statute to comply with the Social Security Act. *Id.* at 1234. Similarly, here, should we find a violation, we believe we have power to provide relief to plaintiffs without unduly infringing upon state powers. At a minimum, we can order the state to propose, in the first instance, alterations to the statute which will expedite the processing of claims by shortening the base period lag.

3. Calculation of the base period implicates the "when due" clause.

Defendant argues that the determination of the base period is used to initially determine the monetary eligibility of a claimant for benefits and the "when due" clause only applies after the claimant has been found eligible under state law. Defendant therefore argues that the Illinois statute cannot be inconsistent with the federal "when due" requirement. We think that the Seventh Circuit rejected this argument in *Jenkins*, 691 F.2d at 1229. In *Jenkins*, an Illinois provision which postponed payment of unemployment benefits to applicants in legal custody

or on bail for work-related crimes until the charges were resolved was challenged as violating the "when due" provision. The court said:

> The state argues that [42 U.S.C. § 503(a)(1)] has no application to this case because benefits do not become due until the criminal charges are resolved; in its view the held in abeyance proviso postpones the determination of eligibility, rather than the payment of benefits to eligible persons.
>
> This is not an absurd argument, although it has been refuted in related contexts . . . . But it would give [§ 503(a)(1)] a very restricted scope, limiting it to cases . . . where the state concedes that unemployment compensation is due someone and simply fails to establish administrative mechanisms that result in paying him within a reasonable time. Under this view a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide.
>
> We think Congress had larger objects in view than the ministerial competence of state comptrollers. Both the humane (or redistributive) objective of unemployment insurance and its macroeconomic objective (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off. Of course he must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment.

Id. at 1229. Therefore, defendant is not entitled to summary judgment on the ground that the "when due" clause applies only after the state has gotten around to finding that the claimant is eligible.

4. The named plaintiff is a class member.

Finally, defendant argues that by amending the complaint to challenge only the failure to include in the base period the processing quarter and not the filing quarter, plaintiff has removed herself from the class. Plaintiff applied for benefits in the second quarter of 1984, making her base period the calendar year 1983, during which she had no wages and was monetarily ineligible. If the base period were expanded as requested in the original complaint to include the processing quarter and the filing quarter, plaintiff apparently would have been eligible when she filed in 1984. However, since plaintiff now seeks only to expand the base period to include the processing quarter (the first quarter of 1984 in her case), she still would not be monetarily eligible because she earned wages only in one of the four base quarters, the first quarter of 1984.

We find that the named plaintiff still has a stake in this litigation and is still a valid class representative. Plaintiff retains a viable economic interest in this suit since if she prevails she will, as will other class members, be entitled to unemployment compensation three months earlier than otherwise. If plaintiff prevails, she would be entitled to unemployment benefits beginning the third quarter of 1984, whereas currently she is only entitled beginning in the fourth quarter of 1984. Hence, we find that she is still a member of the class of those injured by the delay created by Illinois' method of calculation of the base period, and she will benefit by prevailing in this suit. We find that she is still an adequate class representative.

Conclusion

Defendant's motion for summary judgment is denied.

ENTER:

/s/ Honorable Paul E. Plunkett
District Court Judge

Dated: June 13, 1989

App. 57

[Dated January 22, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

State unemployment compensation programs must be certified by the Secretary of Labor in order to receive federal funding. Among the federal preconditions for certification is Section 303(a)(1), 42 U.S.C. §503(a)(1) of Title III of the Social Security Act, which requires that the programs have "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . ." Although the language of section 303(a)(1) addresses the prerequisites for federal certification of state programs, it also serves as a basis for federal courts to order states to stop using federal money unless they conform their programs to those prerequisites. *Jenkins v. Bowling*, 691 F.2d 1225, 1228 (7th Cir. 1982).

This potential class action lawsuit challenges Section 237 of the Illinois Unemployment Insurance Act, Ill. Rev. Stat. ch. 48, §347, which establishes the state's method for determining whether an applicant has earned sufficient wages to qualify for compensation. At issue are whether Section 237, which apparently resembles provisions in forty ~~other~~ states, (1) fails to comport with the federal requirement of payment "when due" by unduly postponing the finding of eligibility of persons who earn the minimum qualifying wages immediately prior to their application date, and (2) arbitrarily creates unequal classifications of applicants, in violation of the Equal Protection Clause of the Fourteenth Amendment. For the following reasons, this court dismisses the equal protection challenge but finds that the challenge invoking the Social Security Act states a claim upon which relief may ultimately be granted.

Background

The defendant in this suit is the Director of the Illinois Department of Employment Security, which administers Illinois' unemployment insurance program, sued in her official capacity. An understanding of the composition of the plaintiff class requires familiarity with the Illinois scheme for identifying eligible applicants.

Under the Act, eligibility requires that an applicant have been paid, during a "base period" of four consecutive calendar quarters, "wages for insured work equal to not less than $1,600, provided that he has been paid wages for insured work equal to at least $440 during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest." Ill.Rev.Stat. ch. 48, ¶420 E. The provision at issue in this case, Section 237, identifies the relevant calendar quarters

comprising the base period as "the first four of the last five completed calendar quarters immediately preceding the benefit year." The "benefit year" begins with the day on which the applicant's claim is filed. Ill. Rev. Stat. ch. 48, §352. Accordingly, the calculation of minimum wages involves the year ending with the second quarter before the quarter in progress when the claimant applies.

Thus, a claimant who earns more wages in the quarter in which he applies, and/or in the fifth quarter (the quarter immediately preceding the quarter in which he applies) than in the four quarters prior thereto may not have sufficient wages to qualify, because the wages of the application quarter and immediately preceding quarter are not counted. This is the position of the named plaintiff and potential class members. They are defined in the complaint as:

> All claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act (the "Act") who, since July 15, 1983, have been, are being or will be denied such benefits by the Illinois Department of Employment Security solely because part or all of their wages, otherwise sufficient to satisfy [the requirements of the Act], were disregarded by operation of Section 237 of the Act.

Plaintiffs allege that they can eventually qualify for benefits, but only by reapplying at a later date when their latest earnings will be counted.

Plaintiffs maintain that this assessment method leaves them without the funds to meet subsistence needs while they seek new employment. Moreover, they allege that it is administratively feasible for Illinois to employ a method using a base period more recent to the application date so as to expedite determination of eligibility and delivery of benefits.

Discussion

This court finds no merit in plaintiffs' claim of denial of equal protection. Section 237 is neutral on its face. It establishes a system, applicable to all, for measuring qualifying wages. The most likely rationale for the lag of the fifth quarter is to provide time for record collection. This system has the effect of distinguishing between two groups of applicants with qualifying wages—those who earn them during the base period of their initial application date and those who earn them during the later base period which includes the fifth quarter. But the equal protection clause does not protect against the disparate impact of a facially neutral rule, in the absence of evidence of a discriminatory purpose or selective application. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 238-248 (1976). Plaintiffs have not alleged and presumably could not prove such intentional discrimination against those with high fifth quarter earnings. Accordingly, they fail to state a claim under the equal protection clause.

The "when due" provision of the Social Security Act, by contrast, establishes a more stringent standard for analyzing the state's method of determining eligibility. In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 129-133 (1971), the Supreme Court discussed the congressional intent that unemployment payments begin as soon as is feasible after job termination so as to replace wages immediately, provide unemployed workers with the means of subsistence and spending money, relieve private charities, enable workers to find jobs equivalent to those they lost, and stabilize industry by maintaining consumer demand.

The specific question before the *Java* Court concerned delay in payments to individuals who had already been found eligible. Defendant attempts to limit the "when due" provision to merely requiring prompt payment upon determination of eligibility. But this reading has been squarely refuted by the Supreme Court, *see Fusari v. Steinberg*, 419 U.S. 379, 388 n.15 (1975); and by the Seventh Circuit's interpretation of the "when due" clause in *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982):

> We think Congress had larger objectives in view than the ministerial competence of state comptrollers. Both the humane (or redistributive) objectives of unemployment insurance and its macroeconomic objective (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off. Of course he must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment. It is true that section 303(a) is in Title III of the Social Security Act, which provides for federal financing of just the administrative expenses of unemployment compensation. See 42 U.S.C. §502. But it does not follow that the concern behind section 303(a) is limited to administrative efficiency in a narrow sense. In fact, the legislative history suggests that the purpose of Title III in general and section 303(a) in particular was to furnish federal money for the administrative expenses of state unemployment compensation programs as an inducement to the states to adopt programs that would achieve the larger objectives suggested above. . . .

(Citations omitted.)

Defendant contends that *Jenkins* is inapplicable because it concerns a rule that indefinitely postponed eligibility

determinations, pending the results of criminal proceedings against applicants. But the case establishes that any system that causes postponement of receipt of benefits by individuals who would have been deemed eligible earlier but for that system must be reasonable. *Id.* Reasonableness requires a balance between the congressional goal of providing swift payment to eligible individuals and the state interest in weeding out ineligible individuals. *Id.* at 1230. Swift payment weighs heavily in that balance. The Supreme Court wrote about section 303(a)(1), "Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish." *California Department of Human Resources Development v. Java*, 402 U.S. at 130. The Court noted that estimates of waiting periods in a report which gave rise to the Social Security Act were between two and four weeks. *Id.* at 131. Moreover, a Department of Labor regulation interprets the "when due" clause as requiring administrative methods that "will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible. . . ." 20 C.F.R. §640.3(a) (1985). Plaintiffs have alleged that greater promptness than that achieved by Illinois' fifth quarter lag approach is administratively feasible for identifying claimants in their circumstances. If plaintiffs can demonstrate that the present system overemphasizes the state's interest in record keeping at the expense of the congressional interest in prompt payment, then the system as applied to them is invalid.

For all the foregoing reasons, we dismiss plaintiffs' equal protection claim but deny defendant's motion to dismiss the claim invoking section 303(a) of the Social Security Act.

ENTER:

/s/ Honorable Paul E. Plunkett
District Court Judge

Dated: January 22, 1986

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, et al.,

Plaintiffs,

vs.

SALLY WARD, Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Judge Plunkett

AMENDED FINAL PRETRIAL ORDER

This matter having come before the Court as a pretrial conference held pursuant to Fed. R. Civ. P. ("Rule") 16, and

Jeffrey B. Gilbert
Legal Assistance Foundation of Chicago
343 S. Dearborn Street
Chicago, IL 60604
(312) 341-1070

Having appeared as counsel for plaintiffs Luella Pennington and the class of unemployment insurance claimants certified by this Court's order of July 11, 1986, and

Richard Grenvich
Assistant Attorney General
401 S. State Street
Chicago, IL 60605
(312) 793-6945

having appeared for the defendant, Sally Ward in her official capacity as Director of the Illinois Department of Unemployment Security ("IDES"), the following action was taken:

I. *NATURE OF THE ACTION*

Plaintiffs in this action are claimants for unemployment insurance ("UI") benefits under the Illinois Unemployment Insurance Act ("IUIA"), Ill.Rev.Stat. ch. 48, §301 *et seq.* They are challenging, as violative of federal law, the statutory definition of "base period," a defined period of time prior to the date the claimant files a claim for UI benefits utilized to determine whether the claimant has a sufficient prior work history to qualify for benefits. The base period is defined in Section 237 of the IUIA. Ill.Rev.Stat. ch. 48, §347. More specifically, plaintiffs contend that Section 237 defines "base period" in a way that delays payment of UI benefits to eligible claimants in violation of: (1) 42 U.S.C. §503(a)(1) (the "when due clause"), which requires a state's unemployment insurance provide for "methods of administration . . . that are . . . reasonably calculated to insure full payment of unemployment compensation when due"; and (2) 20 C.F.R. §640.3(a) which implements the when due clause, and requires states to adopt such "methods of administration as will reasonably insure the full payment of unemployment compensation benefits to eligible claimants with the greatest promptness that is administratively feasible."[1]

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[1] Plaintiff also challenged the base period definition as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. By order of January 22, 1986, that claim was dismissed.

Defendant contends that the definition of "base period" in Section 237 is not in violation of 42 U.S.C. §503(a)(1) and 20 C.F.R. §640(a) because "when due" does not apply to "base periods," but rather comes into effect only after a claimant has been found to be monetarily eligible for entry into a state's program under state law. Assuming *arguendo*, that "when due" does apply to "base periods," then defendant contends that Section 237 meets the requirements for payment "when due."

United States Department of Labor which is *amicus curiae* takes the position that IDES is not required to adopt a base period definition different than the one contained in Section 237 of the IUIA.

II. *JURISDICTION*

The jurisdiction of the Court is invoked under 28 U.S.C. §§1331 and 1337.[2] Defendant disputes jurisdiction and alleges there is no private-right-of-action in this matter, and that the sole remedy for non-conformity with the Social Security Act, or regulations of the United States Department of Labor, is decertification of a state's unemployment insurance program by the United States Secretary of Labor.

III. *STIPULATIONS OF FACT*

A. *The Application Of Section 237*

1. To be eligible for benefits under the IUIA, a claimant must have been paid, during his "base period," wages

[2] Plaintiffs also invoked the Court's jurisdiction under 28 U.S.C. §1343, but that depends upon the viability of their equal protection claim. See n. 1 *supra*.

for "insured work" (as that term is defined in Section 236 of the IUIA, Ill.Rev.Stat. ch. 48, §346) of not less than $1,600 of which at least $440 must have been paid during that part of his "base period" which does not include the calendar quarter in which the wages paid to him were highest. Ill.Rev.Stat. ch. 48, §420(E). (Hereafter the term "sufficient wages" is used to indicate that a claimant has earned both $1,600 of total base period wages and $440 outside the calendar quarter in which wages were the highest.)[3] Those claimants who have sufficient wages in their base period are said to be "monetarily eligible."

2. The question of whether a claimant is monetarily eligible is resolved by a "finding" as required by Section 701 of the IUIA. Ill.Rev.Stat. ch. 48, §451. If a claimant is found monetarily eligible, (s)he is said to have filed a "valid claim" within the meaning of Section 242 of the IUIA. Ill.Rev.Stat. ch. 48, §352.[4] Under the IUIA, a "valid claim" for benefits cannot be filed without sufficient "base period" wages.

3. A "benefit year," for initial claims, is the one year period beginning with the first day of the week (i.e. the Sunday of the week) with respect to which the individual

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[3] For example, for a claimant filing in the first quarter of 1989, the base period would be the fourth quarter of 1987, and the first three quarters of 1988. If the claimant had earned $1160 in one of those base period quarters, $400 in another of the base period quarters, and $20 in each of the other two base period quarters, he would have earned just enough to qualify.

[4] That a claimant files a valid claim does not necessarily mean (s)he will receive benefits, because (s)he can be disqualified based on a non-monetary "determination" issued pursuant to Section 702 of the IUIA. Ill.Rev.Stat. ch. 48, §452. Examples of possible non-monetary reasons for disqualification are "misconduct" or "voluntary leave" disqualifications. *See* Ill.Rev.Stat. ch. 48, §§431 and 432.

first files a valid claim for benefits. Ill.Rev.Stat. ch. 48, §352.

4. Section 237 of the IUIA defines "base_period" as the first four of the last five completed calendar quarters immediately preceding the claimant's benefit year. Ill.Rev. Stat. ch. 48, §347.

5. In determining whether a claimant has sufficient base period wages, Section 237 as enacted, does not allow IDES to use wages earned by a claimant in either the calendar quarter in which his claim is filed (the "filing quarter") or the immediately preceding calendar quarter (the "fifth completed quarter") when it determines whether the claimant has sufficient base period wages.[5]

6. Those claimants who need to have wages in the filing quarter, the fifth completed quarter, or both quarters counted by IDES to establish that they have earned sufficient wages are determined ineligible for benefits as of the date of their initial benefit claim because of the operation of Section 237.

7. Those claimants who do not have sufficient wages pursuant to Section 237 in the base period may be required to wait up to six months until those wages fall into the first four of the last five calendar quarters, defined by a later claim, in order to file a "valid claim" for benefits.

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[5] For example, assume that a claimant earned $1500 in the second base period quarter, $400 in the third, $20 in the fourth but none in the first. Assume, too, that (s)he earned $20 in the fifth completed quarter. Since the wages in the fifth completed quarter are disregarded, the claimant is ineligible as to this claim because, though (s)he earned more than $1600 in the base period defined by Section 237, (s)he did not earn at least $440 outside the calendar quarter in which the wages were highest.

8. For claimants who are not monetarily eligible when they first attempt to file a "valid claim" because some or all of their wages are not in their base period, IDES will accept later filed claims as "valid claims," assuming that there are sufficient wages for the base period defined by the later claims.[6] IDES prospectively treats such claimants as eligible to receive benefits for weeks after the filing of the second or "valid claim," but not for weeks between the filing of the first claim and the filing of the second or "valid claim."

9. A change in the base period to one of the two systems that plaintiff claims are administratively feasible ("alternative systems") will (a) speed payment of benefits to those claimants whose benefits are delayed under the present system; (b) result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the existing system. This latter group includes those who could file a second or "valid claim," but do not do so, or those who become employed again before they can file a second or "valid claim" or before they receive as many weeks of benefits as they would have received under the alternative systems.

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[6] For example, the person described in fn. 5 will be eligible if (s)he files in the next quarter. The new base period will not include the quarter that had been the first base period quarter with reference to the first claim (in which (s)he earned nothing). Instead, it will consist of the second, third and fourth quarters and the fifth completed quarter created by the first claim. Those quarters contain $1500, $400, $20 and $20, respectively. Thus, by reference to the second claim, the claimant has both total wages of more than $1600 and $440 outside the quarter in which the wages were highest.

the Act, were disregarded by operation of Section 237 of the Act.[7]

b. By definition, Section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of the operation of Section 237.

c. In 1986, 525,469 claims for unemployment insurance benefits were filed with IDES. Of these, 63,518 claims were denied because they lacked qualifying wages. Of those 63,518 claims, approximately 15,034 would have been monetarily eligible if the wages they earned in the fifth completed quarter had been counted as qualifying wages, and another 9,115 individuals would have been eligible if the wages they earned in the filing quarter had been counted as qualifying wages.

C. *Reporting Wage Record And Wage Request Systems*

1. Generally speaking, there are two systems that states use for compiling wage data to determine whether unemployment insurance claimants have sufficient wages

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[7] By order of March 19, 1986, this Court permitted plaintiffs to amend their complaint, which was originally filed July 15, 1985, to encompass class members back to July 15, 1980. That decision, which the Court described as "a very close call," was based on the holdings in *Shortess v. City of Chicago*, 617 F.Supp. 661, 662-66 (N.D. Ill. 1985) and *Johnson v. Arnas*, 624 F.Supp. 1067, 1068-1073 (N.D. Ill. 1985), that the limitations period for §1983 actions in Illinois was 5 years. Those decisions have since been rejected in *Kalimara v. Illinois Department of Corrections*, 879 F.2d 276, 227 (7th Cir. 1989). Plaintiffs, therefore, agree that the class herein should be redefined to extend back only two years prior to the filing of the complaint or until July 15, 1983.

to qualify for benefits: the wage record reporting system, and the wage request reporting system.

2. The most common system used today is a wage record system. That is the system used by Illinois. Under a wage record system, those employers who are covered by the state's unemployment insurance statute report gross wages of all their employees to the state's SESA on a regular (usually quarterly) basis.

3. A wage record system is characterized by the existence of a gap between the end of a claimant's base period (in Illinois, the last day of the fourth of the five completed calendar quarters prior to the quarter in which the claimant filed for benefits) and the beginning of that claimant's benefit year (in Illinois, the Sunday of the week in which the claimant filed for benefits). This gap is necessary because some time is required for employers to report wages and for the SESA to make that information available in the local UI offices where claims are first taken and adjudicated.

4. In contrast, under a wage request system, wage information for a particular claimant is requested of that claimant's employer(s) when the claimant files a claim.

5. Since, in a wage request state, wage information is not reported to a SESA except as required to adjudicate each particular claim, SESAs can request the most recent wage information for each claimant. That is, there is no need for a gap (or at least not a substantial one) between the end of the claimant's base period and the beginning of that claimant's benefit year. When the SESA requests wage information, it requests it for the year's period just before the claimant filed the claim. Consequently, wage request systems are characterized by base periods that have either no gap (e.g., the 52 consecutive

calendar week ending with the day immediately preceding the first day of the week in which the claimant files a claim, Mass. Ann. Law ch. 151A, §1(a)), or no substantial gap (e.g., the first 52 of the last 54 weeks preceding the week in which the claimant first files a claim. *See*, R.I. Gen. Laws §28-42-3(10) for benefit years beginning prior to October 1, 1989.

6. A few states "move" the base period upon the filing of a claim by a claimant who needs his more recent wages to qualify. That is, the SESA first looks at the wages earned in the first four of the last five completed calendar quarters, but if the claimant lacks sufficient wages to qualify for benefits, the SESA then redetermines the claim based on the wages earned in the four completed calendar quarters prior to the date of the claim. E.g., Ohio Rev. Code Ann. §4141.01(Q)(1), (2). In one case, Vermont, the base period can be moved to include the wages earned in the last three completed calendar quarters and in the weeks of the filing quarter prior to the date of the claim. 21 V.S.A. §1301(17).

7. A chart of the systems used by all of the states is P. Ex. 2. Approximately 80% of all other jurisdictions have a wage record system similar to that in Illinois.

8. To the best of the parties' knowledge, the Secretary of the United States Department of Labor has certified every state's base period as meeting the requirements of the Social Security Act and the regulations of the United States Department of Labor.

D. *Illinois' Wage Record System*

1. Illinois is a wage record state. When a person first files a claim for unemployment benefits, IDES's staff in the local UI office accesses the Benefit Information Sys-

tem ("BIS") which is a computer based processing system which stores information regarding the payment of unemployment insurance benefits to claimants, processes payments of benefits to claimants and reports on benefit payment activity. BIS is part of the Program and Planning Division of the Management Information System Division of IDES. (Interrog. No. 17, 2nd set; Carrig 15-11.)

2. When a claim is entered on the BIS, the computer generates a document showing the claimant's base period, the wages in each quarter of the base period, and the resultant benefit amount. That document reflects the "finding" required by Section 701 of the IUIA. See Section III.A.2 *supra*. The form on which IDES makes the finding is attached as P. Ex. 3.

3. Illinois employers file, with IDES, quarterly reports of the gross wages paid to their employees. *See*, Ill.Rev. Stat. ch. 48, §§550-553, 56 Ill.Adm.Code 2760 subpart B. This data is used to make both a finding of a claimant's base period wages, that is, whether a claimant files a "valid claim" for benefits, and the computation of the contributions due from the employer to the Illinois unemployment trust fund.

4. Employer's wage reports to IDES are submitted to the Document Control Subdivision of the Revenue Division of IDES.

5. Employers can report wage information either on a form called a UC 3/40 (a copy of which is P. Ex. 4) or on magnetic tape. The UC 3/40 contains two parts. The first is the UC-40 which is the part that records employees' wages.[8]

[8] The second part, the UC 3, is to account for the amount of contributions the employer owes.

6. Employers are required to report by the last day of the month following the quarter in which the wages were paid (i.e., April 30, July 31, October 31, and January 31). See 56 Ill.Adm.Code §2760.125. Hereafter, these months are called "reporting months."

7. When IDES receives wage information from employers on a UC 3/40, the UC 3/40 goes to the Springfield Processing Center at Marine Bank. There the report is opened, sorted by type, given a "batch" number so that it can be identified later if necessary, microfilmed, boxed, the employer's check for contributions paid, if any, is removed and deposited, and the wage information is keypunched and sent on tapes to the State of Illinois Data Center in Springfield. It takes 1 to 5 weeks until the information is input into IDES's computers on its Accum File. IDES receives wage data on tape from Marine Bank which, in that form, can be used by the Illinois Central Computer Facility which has the following four computers: one IBM 3090/600S - 256 MEG - 80 Channels; one IBM 3090/600E - 256-MEG - 80 channels; one IBM 4381 - 32 MEG - 12 channels; and one AMDAHL 5880 - 96 MEG - 48 channels. The operating systems and release versions used by each of these computers is MVS/XA release 2.2 with SE52, and the language used is cobal. The programming was designed by Arthur Anderson and Company.

8. About 85% of the employers file their UC 3/40's in a timely fashion.

9. The Error Correction and Validation Unit corrects UC 3/40's that were improperly filled out. That unit handles less than 1% of the UC 3/40's that are filed.

10. There are four peak periods in which the work IDES does processing the wage information reported by employers is greatest. In the Document Control Subdivi-

sion, these peak periods begin about one week prior to the end of the reporting months, and last about 3 to 8 weeks with an additional week to process delinquent reports.

11. IDES receives about 80% of the employers' wage reports in a ten-day period between the last five days prior to the end of a reporting month and the five days after the end of a reporting month.

12. Approximately 3% of the employers in the state report their wages directly on magnetic tape, but that constitutes about 20-22% of the wage information reported because the employers who do report on magnetic tape tend to be the larger employers.

13. Magnetic tapes are sent to employer representatives in the Magnetic Tape Unit of the Employer Contact Section of the Document Control Subdivision of the Revenue Division of IDES.

14. IDES encourages employers to report wage information on magnetic tape because it is a more efficient means of processing wage reports than by use of the UC 3/40. The magnetic tape substitutes for the wage information that would otherwise be reported on the UC 40. The magnetic tape information of employees' wages is logged and sent by the Magnetic Tape Section of MISD.

15. After a magnetic tape arrives at MISD, it takes 12 to 36 hours until the information contained on it is posted on the computers except that it can be up to 72 hours during peak periods.

16. Less than .001% of the reports sent by magnetic tape have errors.

17. IDES is considering accepting computerized wage data on "floppy disks," but has not instituted that alterna-

tive yet because IDES does not have the computer software to do so and may have to have some new hardware, too.

18. Data entered into the computer system is accummulated in an "Accum File" where it is checked by the computer system against certain criteria (e.g., receipt of all information), and where the Error Correction and Validation Unit corrects mistakes.

19. Prior to July, 1989, IDES stored data on its computers as follows: After the six to eight week cycle that occurs after each quarter when IDES receives and processes wage reports, the information held on the "Accum File" was unloaded onto the Wage Record Data Base. The Wage Record Data Base for a new quarter was then processed to the BIS prior to every quarter so that when a new quarter began, the four quarters included in the base period defined by a claim filed in the new quarter were processed when a finding was requested from the computer in a local UI office. That is, data for a new quarter was added and data for the oldest quarter was dropped from the base period just prior to the end of each quarter. The data was changed over a weekend.

20. As of July, 1989, because of a statutory change to the Illinois Unemployment Insurance Act, IDES began entering wage information for the last completed quarter into its Accum file about once a week and more frequently towards the end of a quarter.[9] Local office employees can

[9] Generally, the statutory change made only the last employer (for whom the claimant worked at least 30 days) prior to the filing of the claim liable for benefit charges, whereas generally, the statutory provision prior to the change apportioned the charges to all base period employers. *See*, P.A. 85-956 and P.A. 86-3 (amending Ill. Rev. Stat. ch. 48, ¶ 572.1).

see these wages as soon as they are posted to the Accum file. The information is used to determine a claimant's last employing unit. This wage information does not interfere with other computerized information. Section 237 of the IUIA does not permit the use of such wages as base period wages.

E. *IDES Computer Data*

1. IDES produced two sets of computer data to plaintiffs. One was information on all 1986 claimants. The other was a sample of 200 claimants from 1985.

2. IDES extracted all claims from 1986 from its BIS database identified by social security number. IDES also provided the wages in each claimant's base period from the BIS. IDES then went to the wage record database and produced each claimant's wages for his/her fifth quarter and filing quarter. From this information, it can be determined who was monetarily ineligible when they first filed and who, among the group of monetarily ineligible claimants, would become qualified by use of the lag quarter wages and/or the filing quarter wages. IDES also identified which claimants who were monetarily ineligible when they first filed actually filed later claims and when they did so. A copy of a document entitled "Final Pennington Statistics," which is data from the 1986 study, is P. Ex. 5. Finally, IDES provided a breakdown by week of how quickly, during a quarter, wage data is reported by employers and input by IDES into its Accum File and checked for errors.

3. Pursuant to a discovery request from plaintiff, and pursuant to a methodology suggested by plaintiff's expert, IDES also provided a sample of 200 claimants from 1985 who were monetarily ineligible. For each such claimant,

IDES provided the date of claim, the wages in each of the four quarters of the base period, and the wages in the filing and lag quarters. A copy of a document entitled "First 200 Ineligible Claims With Effective Dates in 1985 Sorted by Date of Claim, Then Social Security Number" is attached as P. Ex. 6. This document was produced pursuant to this Court's order of December 3, 1986.

F. *IDES Cost Model Accounting*

1. *Introduction*

a. The question of whether it is administratively feasible to change the definition of the base period is largely a question of the costs of the existing system as compared to the costs of any alternative. IDES and other SESA's measure the costs of various parts of their operation by a process developed at the Employment and Training Administration ("ETA") of the United States Department of Labor ("USDOL") and used by SESAs throughout the United States. The process is called cost model management system. The process is described in the Cost Model Management System Handbook ("Handbook"), which is published by the ETA. A copy of the Handbook is P. Ex. 7. The last time the USDOL funded a cost model management study was in 1985.

b. The parties' experts will testify to their opinions of the relative costs of the existing and alternative systems using the data and documents described in this Section III.P.

2. *Cost Model Studies — Plaintiffs' Exhibits 8 and 9*

a. To begin the cost model studies, IDES trained monitors who went to IDES offices and determined

the time that various work required. The monitors issued reports for various functions such as those contained in P. Ex. 8. By analyzing the work done, IDES determined a minute per unit ("MPU") value for each task. IDES then estimated the number of such tasks that were required over a given period (typically a year) and thus determined the number of persons that were required to perform a particular type of work during a given year.

b. The raw data for a cost model study is summarized on step down tables, examples of which are included in P. Ex. 9. The acronyms on the step down sheets are defined in a glossary of the Handbook, a copy of which is P. Ex. 7.

3. *Federal Funding Based On Cost Model Data—Plaintiffs' Exhibits 10 and 11*

a. The cost model process is used by the USDOL to fund IDES, and other SESAs. P. Exs. 10 and 11 are documents reflecting the federal funding for IDES for fiscal years 1986 and 1987 respectively. Defendant's Exhibit 1 reflects the federal funding for IDES for fiscal years 1988, 1989 and 1990. The USDOL funding for staff is called personnel services and personnel benefits ("PSPB"). The USDOL funding for overhead is called non-personnel service needs ("NPS").

b. IDES is budgeted by functions which appear in the column (1) of the first page of P. Ex. 10 (1986).

c. Column (2) is a code number associated with each function.

d. Column (3) is the allocated MPU's (minutes per unit) associated with each function.

e. Column (4), "Workload," is the anticipated number of times each function will need to be repeated during the fiscal year.

f. Column (5) represents the number of staff years that must be paid to accomplish the function during the fiscal year given the allocated MPU's and the estimated workload. Staff years paid reflects both time actually at work and leave time (including, for instance, sick leave, vacation, and personal leave). The need for the time of one staff person for one year is called a personnel equivalent ("PE") or a full-time equivalent ("FTE").

g. Column (6) represents the number of staff years that USDOL estimates will be needed to accomplish the function. The difference between column (5) and column (6) represents leave time associated with the staffing required to perform each function during the fiscal year.

h. The top of pages of P. Ex. 11 (1987) is a similar table reflecting FY 1987 allocations. The bottom of page 2 of P. Ex. 11 reflects a breakdown of tasks that comprise four of the functions.

i. In FY 1986, the USDOL paid $27,351 for each staff year. That number is reflected at the top of P. Ex. 10 (1986). It is an average of the costs of staff and includes not only base pay, but also benefits. (Clark at 9.) USDOL pays an additional amount for overhead associated with each staff position which for FY 1986 was approximately $6,660 per person.

j. In FY 1986, the USDOL funded 1834.83 PE's at IDES as reflected on the first page of P. Ex. 10. (The number includes a handwritten amount for administrative staff and technical ("AS&T") functions added and then reflected in the handwritten total.)

k. In FY 1987, the USDOL funded 1,884.56 PE's at IDES as reflected on pages 1 and 3 of P. Ex. 11. PE's in FY 1987 were funded at three different rates: $28,164 for regular staff, $26,788 for additional staff, and $31,422 for administrative support and technical staff. See p. 3 of P. Ex. 4 (Eggebrecht at 53). The handwritten amounts on p. 37 of P. Ex. 11 are the salary alone without the costs of benefits. (Eggebrecht at 53.)

4. *Cost Model Schematics — Plaintiffs' Exhibits 12 and 13*

a. P. Exs. 12 and 13 are cost model schematics for initial claims functions and for wage record functions. This document breaks the cost of a function into its subparts. For instance, on the left of P. Ex. 12 (initial claims) is the MPU's for initial claims functions. The bottom number represents the total MPU's; the top number excludes that part of the MPU's for which IDES contracts with outside contractors, as represented by note "(4)." These numbers differ from those on P. Exs. 10 and 11 in that they represent the time IDES concludes from its studies that a task will actually take ("studied numbers" or "studied MPU's") whereas the figures on P. Exs. 10 and 11 represent the time that the USDOL will fund ("funded numbers" or "funded MPU's").

b. P. Ex. 13 is a cost model schematic of the wage record function.

IV. *CONTESTED ISSUES OF FACT AND LAW*

The central contested factual question is whether it is administratively feasible for IDES to use a different

definition of the base period that would include the wages in the fifth completed quarter of class members so as to speed the payment of benefits to the class.

Defendant characterizes the issue differently. She would characterize the plaintiff's claim as attempting to make the plaintiff class members monetarily eligible for benefits that they would not have otherwise been entitled to receive under the existing statute. Plaintiff disagrees with this characterization.

Issues of law are set forth in the parties' trial briefs, proposed findings of fact and conclusions of law, and in the briefs on summary judgment.

As to relief, the defendants contend that Section 237 of the IUIA may only be changed by the Illinois General Assembly, because, IDES contends, only the General Assembly has the authority to amend Section 237. Plaintiffs dispute this contention.

V. *EXHIBITS*

A. *Plaintiffs' Exhibits*

The parties stipulate to the authenticity and admissibility of all plaintiffs' exhibits. These exhibits are:

1. Organizational chart of IDES depecting the existing organizational structure of IDES.
2. Chart of the base periods used by the 50 states in their unemployment insurance system.
3. IDES UI Claimant Information Sheet by which IDES notifies a claimant of a "finding" under Section 701 of the IUIA.
4. A sample of the UC 3/40 on which an employer can report the wages paid quarterly to its employees.

5. "Final Pennington Statistics"—a partial report from the data compiled in IDES' 1986 study.
6. "First 200 Ineligible Claims With Effective Dates in 1985 Sorted by Date of Claim, Then by Social Security Number"—data reported by IDES pursuant to this Court's order of December 3, 1986.
7. A copy of the "Cost Model Management System Handbook" which is published by the Employment and Training Division of the United States Department of Labor.
8. Reports from IDES' monitors for cost model studies.
9. Step down tables which summarize data compiled from the cost model monitors' study of the time for various functions at IDES.
10. "Grants to States/UI Activity Details"—document reflecting allocation of USDOL's funding for IDES' activities in FY 1986.
11. USDOL's allocation of funding for IDES' activities in FY 1987.
12 Cost model schematic for initial claims functions.
13. Cost model schematic for wage record function.
14. Vitae of Peter Kauffman.
15. Complete copy of "Comparative Analysis of Wage Record Reporting and Wage Request Reporting."
16. Shortened version of "Comparative Analysis of Wage Record Reporting and Wage Request Reporting" that was published in "Unemployment Compensation: Studies and Research."
17. A chart of the base period quarters, lag quarter and filing quarter that can be used to demonstrate the present system and possible alternatives.
18. "Summary of Findings of Alternative Methods of Processing Monetarily Ineligible Claimants" and attached graphs and charts. (Kauffman's study of the 1986 claimants).

19. Kauffman's charts and data summarizing his study of the 200 1985 claimants.

B. *Defendant's Exhibits*

The parties stipulate to the authenticity and admissibility of all of defendants exhibits. These exhibits are:

1. "Grants to States/UI Activity Details," (UI-2's), 1988, 1989, 1990.
2. UIAS, historical date unemployment insurance program payments, dated February 26, 1988 and March 3, 1988.
3. Computer Developmental costs, dated October 19, 1987.
4. Study of costs for implementation of alternative base periods, dated December 17, 1987.
5. Diagram of present and proposed base period for Pennington.
6. UIAS estimated benefit cost, dated January 21, 1988.
7. UIAS estimated benefit cost, dated January 13, 1988.
8. Examples of receipt of wage data information from employers for the quarters 3/85 to 2/87.
9. Vitae of Michael D. Marshman.
10. Vitae of Gerald Strom.
11. Letter of May 31, 1990 from Marshman to Richard Grenvich.

VI. *WITNESSES*[10]

A. *Plaintiffs' Witnesses*

Plaintiffs will call:

Peter Kauffman
Management Engineers, Inc.
1890 Preston White Drive
Reston, VA 22091

Mr. Kauffman's vitae is attached as P. Ex. 14. A copy of his study entitled "Comparative Analysis of Wage Record Reporting and Wage Request Reporting" is P. Ex. 15. A shortened version with the same title that was published in "Unemployment Compensation: Studies and Research" is P. Ex. 16.

Plaintiffs may call:

Luella Pennington
6321 N. Winthrop
No. 103
Chicago, IL 60660

Irving Carrig
5555 S. Everett
Chicago, IL 60637

Arlington Davis
1218 E. 85th Street
Chicago, IL 60619

Robert P. Eggebrecht
1905 W. Touhy Ave.
Chicago, IL 60626

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[10] Each party reserves the right to call such rebuttal witnesses (who are not presently identifiable) as may be necessary, without prior notice to opposing party.

Benjamin Clark
7518 S. King Drive
Chicago, IL 60619

Miles Paris
201 Kedzie Ave.
Evanston, IL 60202

Melissa Barton
1318 S. Princeton
Arlington Heights, IL 60005

Kathleen Burroughs
434 Clinton Place
River Forest, IL 60305

Rose Mary Rago
2026 S. Goebbert Rd.
Arlington Heights, IL 60005

Robert Malooly
5915 Carroll
Morton Grove, IL 60053

William R. Grant
447 E. 87th Place
Chicago, IL 60619

Norman Harelik
4800 S. Lake Park Ave.
Chicago, IL 60615

William Bell
601 E. 32nd Street
Chicago, IL 60616

B. *Defendant's Witnesses*

1. Defendant will call the following witnesses as experts:

Michael D. Marshman
3711 N. 25th Rd.
Arlington, VA 22207

Mr. Marshman will be called to testify as to the costs and charges necessary to implement an alternative base period system. Mr. Marshman's vitae is Defendant's Exhibit No. 9.

Gerald D. Strom
4247 Blanchan Ave.
Brookfield, IL 60513

Professor Strom may be called to testify as to the validity of statistical analysis. Prof. Strom's vitae is Defendant's Exhibit No. 10.

2. Defendant may call:

Luella Pennington
6321 N. Winthrop
No. 103
Chicago, IL 60660

Irving Carrig
5555 S. Everett
Chicago, IL 60637

Arlington Davis
1218 E. 85th Street
Chicago, IL 60619

Robert F. Eggebrecht
1905 W. Touhy Ave.
Chicago, IL 60626

Benjamin Clark
7518 S. King Drive
Chicago, IL 60619

Miles Paris
201 Kedzie Ave.
Evanston, IL 60202

Melissa Barton
1318 S. Princeton
Arlington Heights, IL 60005

Kathleen Burroughs
434 Clinton Place
River Forest, IL 60305

Rose Mary Rago
2026 S. Goebbert Rd.
Arlington Heights, IL 60005

Robert Malooly
5915 Carroll
Morton Grove, IL 60053

William R. Grant
447 E. 87th Place
Chicago, IL 60619

Norman Harelik
4800 S. Lake Park Ave.
Chicago, IL 60615

William Bell
601 E. 32nd Street
Chicago, IL 60616

Ray Bailey
720 Richard Rd.
Springfield, IL 62791

VII. *DEPOSITIONS*

The parties intend to use depositions or other discovery responses only if subpoenaed witnesses do not appear, or for purposes of impeachment.

VIII. *SETTLEMENT NEGOTIATIONS*

IDES cannot settle a case challenging a provision of the IUIA.

IX. *TRIAL TIME*

Trial of this case is expected to take 4 days.

By: /s/ JEFFREY B. GILBERT
One of the Attorneys for
Plaintiffs

Jeffrey B. Gilbert
Karyn Glass
Legal Assistance Foundation
of Chicago
343 S. Dearborn Street
Chicago, IL 60604
(312) 341-1070

By: /s/ RICHARD GRENVICH
One of the Attorneys for
Defendant

Richard Grenvich
Assistant Attorney General
401 S. State Street
Chicago, IL 60605
(312) 793-6945

No. 94-592

FILED
OCT 28 1994

In The

Supreme Court of the United States

October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, FLORIDA, GEORGIA, IDAHO, INDIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, UTAH, VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN,
Attorney General of the State of California
CHARLTON G. HOLLAND, III
Assistant Attorney General
DENNIS ECKHART, Supervising Deputy Attorney General
*PAUL REYNAGA
Deputy Attorney General
1515 K Street
Sacramento, CA 95814
Telephone: (916) 327-7854
**Counsel of Record for Amici States*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

James H. Evans
Attorney General
State of Alabama

Bruce M. Botelho
Attorney General
State of Alaska

Grant Woods
Attorney General
State of Arizona

Robert A. Butterworth
Attorney General
State of Florida

Michael J. Bowers
Attorney General
State of Georgia

Larry EchoHawk
Attorney General
State of Idaho

Pamela Carter
Attorney General
State of Indiana

Michael E. Carpenter
Attorney General
State of Maine

J. Jospeh Curran, Jr.
Attorney General
State of Maryland

Hubert H. Humphrey, III
Attorney General
State of Minnesota

Mike Moore
Attorney General
State of Mississippi

Joseph P. Mazurek
Attorney General
State of Montana

Don Stenberg
Attorney General
State of Nebraska

Deborah J. Poritz
Attorney General
State of New Jersey

Heidi Heitkamp
Attorney General
State of North Dakota

Lee Fisher
Attorney General
State of Ohio

Theodore R. Kulongoski
Attorney General
State of Oregon

T. Travis Medlock
Attorney General
State of South Carolina

Jan Graham
Attorney General
State of Utah

James S. Gilmore, III
Attorney General
State of Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

JOSEPH B. MEYER
Attorney General
State of Wyoming

QUESTION PRESENTED

Is an Illinois statute which sets forth the applicable time period from which previous earnings will be considered in determining whether a claimant is eligible for unemployment insurance benefits a "method[] of administration", subject to the prompt payment "when due" requirement of the Social Security Act, or is it an eligibility standard, excluded from the prompt payment requirement?

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INTEREST OF AMICI STATES

At issue in this case is whether an Illinois statute prescribing the time period over which wage earnings will be counted for the purpose of determining eligibility for state unemployment insurance benefits (the "base period"), is subject to the prompt payment requirements of section 303(a)(1) of the Social Security Act (the "Act"). 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1). The resolution of that issue by the Court of Appeals has jeopardized the continuing validity of the Illinois statute and cast significant doubt upon the legality of base period statutes in effect in the overwhelming majority of the states.

The Court of Appeals held that the Illinois statute is a "method[] of administration" within the meaning of the Act and, therefore, is subject to the Act's requirement that a state promptly pay benefits "when due," rather than being an eligibility standard, which is not subject to the prompt payment requirement. Accordingly, the matter was remanded to the District Court for factual findings and a determination as to whether the Illinois base period statute is in compliance with section 303(a)(1). Specifically, the District Court must determine whether the Illinois statute "insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Pennington v. Didrickson*, 22 F.3d 1376, 1388 (7th Cir. 1994).

As noted in Illinois' petition for writ of certiorari, at least forty-seven other states and jurisdictions, including California and the states that have joined in this brief, have base period statutes similar to the Illinois statute. (Petition for Writ of Certiorari ("Petition"), pp. 7-9, and

ftn. 2.) Those base period statutes were drafted in conformity with suggested legislation ("draft bills") prepared by the United States Department of Labor ("USDOL") to guide the states in crafting their individual unemployment statutes. In reaching its decision, the Court of Appeals refused to defer to the USDOL's regulations and draft bills, which reflect the USDOL's long-standing recognition of the validity of base period standards such as the one at issue.

Amici states now face the likely prospect of legal challenges to their base period statutes as a result of the Court of Appeals' holding that such statutes are subject to the prompt payment provisions of section 303(a)(1) of the Act. These legal challenges will impose substantial defense burdens on each of amici states, since each will be forced to defend its particular base period and related wage information collection system, should the Court of Appeals' decision in this case be followed in its jurisdiction. Furthermore, if base period statutes in other jurisdictions are found to be subject to and out of compliance with section 303(a)(1), massive and costly restructuring of state unemployment wage information collection and processing systems is likely to result. See, e.g., *Pennington*, 22 F.3d at 1380, ftn. 3.[1]

---

[1] The ultimate impact of the *Pennington* decision on state unemployment systems is a matter of special concern to states with larger systems, such as California which has the most claims filed of any of the states. In this regard, a recent USDOL report of regular unemployment benefit claims filed over a 12-month period shows there were 3,202,847 initial claims filed in

SUMMARY OF THE ARGUMENT

The Court of Appeals erred when it held that the Illinois base period statute, which clearly is identified and operates as an eligibility provision, is an "administrative method" and, therefore, subject to the prompt payment "when due" clause of section 303(a)(1). The Court of Appeals would not have reached this incorrect result had it deferred to the interpretations of the USDOL in this regard. As a result of the Court of Appeals' decision, unemployment benefit claimants in other states will be encouraged to pursue similar litigation in their states, which will place unnecessary burdens on those other states in defending their statutes, as well as heavy burdens on the trial and appellate courts.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO DEFER TO USDOL'S REASONABLE AND LONG-STANDING INTERPRETATION THAT ILLINOIS' BASE PERIOD COMPLIES WITH THE PROVISIONS OF THE SOCIAL SECURITY ACT

The unemployment insurance system is administered by the states, which receive federal funds for that

---

California. The next closest in number is New York with 1,107,833 claims filed. Illinois had 764,856 claims filed during that same period. UI Data Summary, UIS, 2nd Quarter CY94, USDOL, Unemployment Insurance Service, Division of Actuarial Services, September 1994.

purpose. 42 U.S.C. § 502. Section 303(a)(1) of the Social Security Act provides that "[t]he Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor . . . includes provision for . . . [s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). The Secretary of Labor has interpreted this language as requiring "such methods of administration as will reasonable [sic] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

There does not appear to be any disagreement among the parties that substantive state unemployment insurance eligibility requirements are not considered to be "methods of administration" and, therefore, are not subject to the "when due" clause. See *Pennington*, 22 F.3d at 1381, ftn. 4. This conclusion results from the recognition that the states have been given broad latitude to develop their own unemployment compensation eligibility criteria. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 537-540 (1979).

Section 500 of the Illinois unemployment insurance act provides that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that . . . he has been paid during his base period wages for insured work equal to not less than . . . " the minimum amounts specified in the statute. 820 ILCS 405/500. Illinois defines "base period" as "the

first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237. The "benefit year" begins on the first day of the week that a valid claim is filed. 820 ILCS 405/242. In accordance with the above, no earnings are considered from the fifth quarter, which is characterized as the "lag quarter," in determining eligibility for benefits.

The existence of this lag quarter is the focus of respondents' complaint. *Pennington*, 22 F.3d at 1379. Respondents contend that the presence of a lag period operates to delay the payment of benefits to those claimants who initially lack sufficient earnings to qualify for benefits but would be eligible for benefits if their lag period earnings were counted. This could occur if they file a claim during a later quarter.

In determining the applicability of section 303(a)(1) of the Social Security Act to the Illinois base period statute, the Court of Appeals held that the state's base period definition is an "administrative method" subject to the "when due" clause. *Pennington*, 22 F.3d at 1388. The court reached this holding despite the fact that the Illinois base period statute does not address the subject of *when* benefits must be paid. The court failed to accept the fact that the base period statute is intended to be, and does operate as, a substantive standard for determining eligibility for benefits, i.e., a standard for determining *whether* benefits are due.

In reaching its holding, the Court of Appeals considered, but rejected, the contrary position of the USDOL which appeared as amicus curiae below, in support of Illinois. The USDOL took the position that the Illinois

base period standard is a legitimate eligibility requirement that defines what earnings will be considered in determining whether benefits are due. (Brief For The United States of America As Amicus Curiae Supporting the Appellee, before the U.S. Court of Appeals for the Seventh Circuit, May 14, 1992, p. 7.) By failing to defer to the position of the agency which administers the provisions of the Social Security Act relating to unemployment compensation, on a matter not directly addressed in the Act, the Court of Appeals failed to adhere to well-established precedent of this Court. That precedent holds that a court should defer to reasonable interpretations of a federal statute by an agency that administers the statute, provided that the statute is ambiguous or does not address the specific matter at issue and, provided further, that the agency's interpretations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-845 (1984); *National R.R. Passenger Corp. v. Boston & Maine Corp.,* ___ U.S. ___, 112 S. Ct. 1394, 1401 (1992).

The Court of Appeals characterized the USDOL's interpretations of section 303(a)(1) as " 'agency litigating positions,' " not entitled to deference when they are " 'unsupported by regulations, rulings or administrative practice.' " *Pennington,* 22 F.3d at 1383; quoting from *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212 (1988). The Court of Appeals placed great emphasis on what it considered to be a lack of "formal regulations" reflecting the USDOL's interpretations. *Pennington,* at 1383-1384. The court also emphasized that there is no formal USDOL regulation directly stating that "the length of lag periods

is a matter of eligibility within the exclusive authority of the states." *Id.* at 1383.

The standard for deference applied in this instance by the Court of Appeals is too narrow; it does not conform with the standards specified in the above-cited decisions of this Court. Contrary to the Court of Appeals' characterization of the circumstances, existing USDOL regulations and long-standing interpretations relating to base periods support USDOL's position below. In this regard, the USDOL has adopted regulations which expressly implement the provisions of section 303(a)(1) of the Act regarding "methods of administration" and the "when due" clause. See 20 C.F.R. Parts 640 and 650.

Part 640 of the USDOL regulations sets out specific time standards for prompt payment of unemployment benefits by the states. 20 C.F.R. § 640.5. Part 650 prescribes specific time periods for prompt state administrative hearing and decision processes relating to benefit appeals. 20 C.F.R. § 650.4. These implementing regulations single out the states' procedures for the payment of benefits and for appeals as "methods of administration" referred to in section 303(a)(1) of the Act. The regulations are designed to insure the full payment of unemployment benefits to claimants "when determined under the State law to be due." 20 C.F.R. § 640.1(a). Nowhere in USDOL regulations are base period standards identified as "methods of administration" governed by the USDOL regulations.[2]

---

[2] With regard to promptness of payment, the regulations note:

> "Accordingly, implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations

In addition to the above formal rules, nearly 60 years ago the USDOL issued policy interpretations relating specifically to base periods. These interpretations are reflected in "draft bills" for suggested state unemployment compensation laws, issued by the USDOL in 1937. In the draft bills, the USDOL placed a base period standard in the section containing suggested eligibility criteria. That particular base period standard provides for a lag quarter just like that used in the Illinois statute. Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, revised edition, January 1937, § 4(e).[3] Nevertheless, the Court of

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> of eligibility. However, applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(b).

The promptness of Illinois' *procedures* for paying benefits and determining eligibility are not at issue in this case; rather, at issue is the substance of Illinois' base period eligibility criteria, a subject which the USDOL recognizes is not within the scope of federal regulation under section 303(a)(1).

[3] The draft bill provides the following with respect to base periods:

> "Benefit Eligibility Conditions
>
> "Sec. 4 An unemployed individual shall be eligible to receive benefits with respect to any week only if the commissioner finds that
>
> ". . . . .
>
> "(e) He has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages for employment by employers equal to not less that sixteen times his weekly benefit amount."

(An errata sheet for the draft bills changed the above to read "the first *three* out of the last *four* completed calendar quarters . . . ," without changing the concept of a "lag" quarter.)

Appeals disregarded these interpretations by the USDOL because it considered them to be ambiguous, noting that they were not adopted as formal regulations. *Pennington*, 22 F.3d at 1384.

The Court of Appeals should have deferred to the USDOL's interpretations of section 303(a)(1), because they are reasonable and are reflected in the USDOL's existing regulations and the long-standing interpretations contained in the draft bills. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Those regulations and draft bills clearly show that the USDOL considers base periods to be eligibility criteria and, therefore, not subject to the "when due" clause of section 303(a)(1). There is no ambiguity with regard to the USDOL's intent in this respect.

II

IF THE ERRONEOUS DECISION BELOW IS ALLOWED TO STAND WITHOUT REVIEW BY THIS COURT, IT WILL BREED A MULTIPLICITY OF UNNECESSARY LITIGATION, IMPOSING SEVERE DEFENSE BURDENS ON AMICI STATES, AND POSSIBLY RESULT IN DISHARMONY AMONG THE CIRCUITS

Litigation similar to that which has occurred in this case is likely to occur in many other states given that at

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The original California base period statute, adopted in 1939, tracks the draft bill:

> "Sec. 52.2 The term 'base period' means the first four out of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year." Stats. Cal., c. 674, § 52.2, p. 2148, 1939.

least forty-seven other states and jurisdictions have similar base period statutes. (Petition, p. 8, ftn. 2.)[4] Potential

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[4] For example, the following provisions are contained in the California Unemployment Insurance Code:

> § 1275. "Unemployment compensation benefit award computations shall be based on wages paid in the base period. 'Base period' means: for benefit years beginning in November, December, or January, the four calendar quarters ended in the next preceding month of June; for benefit years beginning in February, March, or April, the four calendar quarters ended in the next preceding month of September; for benefit years beginning in May, June, or July, the four calendar quarters ended in the next preceding month of December; for benefit years beginning in August, September, or October, the four calendar quarters ended with the next preceding month of March. . . ."
>
> § 1281. "(a) An individual cannot establish a valid claim or a benefit year during which any benefits are payable unless during his or her base period:
>
> ". . . .
>
> "(3) For new claims filed with an effective date beginning on or after January 1, 1992, he or she has met one of the following conditions:
>
> "(A) He or she has been paid wages for employment by employers during the quarter of his or her base period in which his or her wages were the highest of not less than one thousand three hundred dollars ($1,300)."
>
> "(B) He or she has been paid wages for employment by employers during the quarter of his or her base period in which his or her wages were the highest of not less than nine hundred dollars ($900) and been paid wages for employment by employers during his or her base period equal to 1.25 times the amount he or she was paid in this same quarter."

plaintiffs in other states could use virtually the same complaint as that used in this case, since the state statutes are substantially similar, and the same federal statute and regulations are involved. It will conserve precious judicial resources to have the issue presented in this case resolved by this Court now, rather than forcing its resolution among the circuits on a case by case basis.

The sole issue presented by this case is strictly a legal one: the application of the "when due" clause of section 303(a)(1) to base period standards. Resolution of that issue by this Court will ensure harmony among the circuits in this area of the law. Although amici states believe that the Seventh Circuit misconstrued the application of section 303(a)(1), some district and circuit courts considering the issue may follow the Seventh Circuit's lead. The probability of such an outcome is significant given the likelihood of a multitude of legal challenges among the states.

Additionally, in those trial and appellate courts that follow the holding of the Seventh Circuit that the "when due" clause applies to base periods standards, the states will be forced to justify any time delays caused by the lag periods in their base period eligibility criteria. This will impose severe defense burdens upon the states, since the issue of whether a base period is in compliance with the "when due" standard is factually very complex and full of uncertainties, given its direct relationship to each state's capacity to collect and process wage data. That capacity will be measured against the standard of administrative feasibility found in 20 C.F.R. § 640.3(a). Furthermore, if a state base period standard is determined to be out of compliance with the "when due" clause, additional

difficulties will occur in determining what modifications to state unemployment systems will be necessary, how those modifications will be implemented and at what cost. A good example of the complexity of these problems is available in the present litigation. *Pennington*, 22 F.3d at 1378-1380 and ftn. 3.

In a footnote, the Court of Appeals suggests that the USDOL can always "issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations." *Pennington*, 22 F.3d at 1388, ftn. 9. However, such action is highly unlikely given that the USDOL is not bound by the Court of Appeals' decision and the USDOL has taken the position that base periods are not subject to the "when due" clause. The likely result will be that the courts in different states will be forced to determine what is administratively feasible in base period criteria to achieve prompt payment. That will likely yield varying results among the states.

In contrast, if this Court were to rule on the application of the "when due" clause to base periods standards, the result will either be maintenance of the status quo if *Pennington* is reversed or, if the opposite occurs, adoption of a uniform standard for all the states. Thus, if this Court were to find that the "when due" clause does apply to base periods standards, it is very likely that the USDOL would in that event adopt base period regulations for all the states. This is exactly what happened after this Court issued its decision in *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971).[5] See 20 C.F.R. § 650.1(a).

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[5] That case is discussed on pages 11 through 12 of the petition.

Therefore, it will conserve judicial resources, promote harmony among the circuits, and protect the states from unnecessary and costly litigation if this Court accepts this case for review.

CONCLUSION

Resolution by this Court of the question of whether Illinois' base period standard is a method of administration or an eligibility criterion is of immediate and vital importance to each of the amici states and to virtually every other state in the Union. Amici urge the Court to grant Illinois' petition.

Dated: October 28, 1994

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
CHARLTON G. HOLLAND, III
Assistant Attorney General
DENNIS ECKHART,
Supervising Deputy
Attorney General
*PAUL REYNAGA
Deputy Attorney General

Counsel of Record for Amici States

Supreme Court, U.S.
FILED
OCT 27 1994
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NO. 94-592

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Pursuant to Sup. Ct. R. 39, Respondent, LUELLA PENNINGTON, moves to file her Brief in Opposition to the Petition For Writ Of Certiorari filed herein. In support thereof, Pennington offers the attached affidavit evidencing her financial status and states that:

1. She represents a class of claimants who have or will apply for unemployment insurance in Illinois;

2. She is, and has been represented in this matter, by the Legal Assistance Foundation of Chicago ("LAFC"), a legal services organization. One of her attorneys, Mr. Jeffrey B. Gilbert, has been a partner with Johnson, Jones, Snelling & Gilbert since September 16, 1994, but was

employed at LAFC for fifteen years prior thereto. Since his departure from LAFC, Mr. Gilbert has remained as counsel to Ms. Pennington and the class in this case and is co-counseling with LAFC;

3. On July 7, 1985, Ms. Pennington moved to file this action in forma pauperis in the United States District Court for the Northern District of Illinois. That motion was granted on July 19, 1985.

WHEREFORE, Respondent requests that this Court permit her to proceed in forma pauperis.

Respectfully submitted,

JEFFREY B. GILBERT
Johnson, Jones, Snelling & Gilbert
343 South Dearborn Street
Suite 1110
Chicago, Illinois 60604
(312) 341-9366

ROBERT E. LEHRER
DORY RAND
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Respondent

NO. 94-592

IN THE
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LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, **LUELLA PENNINGTON**, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in this matter without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that I desire to respond to the Petition for Certiorari filed by Lynn Q. Doherty and to otherwise defend the Court of Appeals' decision should this Court grant the Petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appear are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per annum per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I was last employed part-time in September 1986 when I earned approximately $4.00 per hour for 20 hours per week, and I received some additional unemployment insurance benefits for a total of approximately $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes; describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? YES

a. If the answer is yes, state the total value of the items owned.

I have a checking account (No. 10000655084) at Merchandise National Bank in Chicago, Illinois. I receive a month Social Security check in the amount of $467. I have approximately that amount (or a little more) in the account. When a check is

deposited, ~~and~~ I spend it down through the month until the next check arrives. I also receive $ 80- in food stamps every month.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I have no dependents other than myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to ~~penalties~~ for perjury.

Luella Pennington
LUELLA PENNINGTON

SUBSCRIBED AND SWORN to before me this 24 day of OCTOBER, 1994.

"OFFICIAL SEAL"
Kathleen M. Moore
Notary Public, State of Illinois
My Commission Expires 12/16/97

Kathleen M. Moore
NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY B. GILBERT
Johnson, Jones, Snelling & Gilbert
343 South Dearborn Street
Suite 1110
Chicago, Illinois 60604
(312) 341-9366

ROBERT E. LEHRER
DORY RAND
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Respondent

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STATEMENT OF THE CASE

I. THE NATURE OF THE ACTION

Respondent, Luella Pennington, and the members of the class she represents, are claimants for unemployment insurance ("UI") benefits under the Illinois Unemployment Insurance Act ("IUIA").[1] 820 ILCS 405/100 et seq. They brought this case against Petitioner, the Director of the Illinois Department of Employment Security ("Director" of "IDES"), to challenge the statutory definition of "base period" found at section 237 ("section 237") of the IUIA. 820 ILCS 405/237. The base period is the time period within which claimants must have earned sufficient wages to qualify for UI benefits. The claimants argue that the definition of "base period" in section 237 delays payment of UI benefits in violation of 42 U.S.C. § 503(a)(1), which requires that a state's unemployment insurance law provide for "methods of administration ... reasonably calculated to insure full payment of unemployment compensation when due" (the "when due" clause), and the Secretary of Labor's regulations implementing the "when due" clause. 20 C.F.R. pt. 640.

A panel of the Court of Appeals for the Seventh Circuit held, unanimously, that section 237 defined a "method of administrative" that was subject to the when due clause. Appendix ("App") 1-24.[2] It then remanded the case to the district court for a

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[1] Because this case involves numerous acronyms, a glossary is included at the end of this brief.

[2] In addition to the Appendix, which is bound with the Petition For Writ of Certiorari and which we cite as "App.", we cite to: the Petition itself ("Pet."); Respondent's Appendix ("Resp. App.") which is attached to this brief; and portions of the record transmitted to the Court of Appeals, including the trial transcript ("Tr.") and plaintiffs' trial exhibits ("P. Ex.").

factual determination as to whether that administrative method complied with the "when due" clause and the implementing regulations. Id. at 23-4. The Director filed a petition for rehearing and suggestion for rehearing en banc in the court of appeals, but "no judge in active service ... requested a vote thereon, and all judges on the original panel ... voted to deny the petition." Id. at 26. Accordingly, the Director's rehearing petition was denied. Id. at 25-6.

The panel also denied the Director's motion to stay the mandate pending her filing of a petition for writ of certiorari in this Court. Resp. App. 1-3. In its ruling on that motion, the panel observed, among other things, that the Director did not enjoy a probability of success on the merits of her petition for a writ of certiorari, and that, in any event, she might ultimately prevail in the litigation on remand. Id. at 2-3. Accordingly, the appellate court's mandate issued, and the case is proceeding apace in the district court.

II. STATEMENT OF FACTS

Throughout her petition, the Director ignores the most important facts, virtually all of which are ones to which she stipulated. We present these facts here, citing to the Stipulations of Fact in Section III of the Amended Final Pretrial Order, which are found in the Appendix at 66-84.[3] E.g., "Stip. ¶ A.1, App. 66-7."

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[3] The citations to Illinois statutes in the Stipulation are to the old "Illinois Revised Statutes" ("Ill. Rev. Stat.") which have been replaced by a new codification, "Illinois Consolidated Statutes" ("ILCS").

A. The Operation Of Section 237 Under The IUIA

In Illinois, an eligible claimant can draw regular UI benefits during a "benefit year," which is the one-year period beginning with the Sunday of the week in which she first files a "valid claim" for benefits. 820 ILCS 405/242; Stip. ¶ A.3, App. 67-8. To file a valid claim, however, a claimant must have earned sufficient wages during a year period called the "base period."[4] Id. at 242 and 500.E.; see Stip. ¶ A.1, App. 66-7.

The claimants do not challenge either the amount of earnings required to qualify for benefits under the IUIA or section 237's dictate that a claimant must have earned that amount during a one year period. Rather, the claimants challenge section 237's definition of that one year period as necessarily including only "the first four of the last five completed calendar quarters immediately preceding the benefit year" (the "section 237 base period"). Id. at 237; see Stip. ¶ A.4, App. 68. By that definition, section 237 skips both the calendar quarter in which the claimant files his claim (the "filing quarter"), because that is not a "completed" quarter, and the preceding calendar

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[4] To be eligible for benefits, a claimant must have earned at least $1600 during the whole base period and at least $440 outside the calendar quarter in which he earned the most wages. 820 ILCS 405/500.E; see Stip. ¶ A.1, App. 66-7. We call this the "earnings requirement."

Whether a claimant has sufficient wages in his base period is resolved by a "finding" issued pursuant to Section 701 of the IUIA. Id. at 701; see Stip. ¶ A.2, App. 67. If a claimant is monetarily eligible, he is said to have filed a "valid claim." Id. at 242 and 500.E; see Stip. at ¶ A.2, App. 67.

That a claimant has filed a valid claim does not necessarily mean that he will receive benefits, however, because he can be disqualified based on a non-monetary "determination" issued pursuant to section 702 of the IUIA. Id. at 702; see Stip. at ¶ A.2 n. 4, App. 67. Examples of non-monetary disqualifications are those that disqualify claimants who were "discharged for misconduct connected with work" or "voluntarily leaving work without good cause attributable to the employ[er]." See id. at 601 and 602.

quarter (the "lag quarter"), because that is the fifth of the five completed calendar quarters prior to the benefit year. See Stip. ¶ A.5, App. 68; Tr. 16-19. Consequently, when IDES determines whether a claimant has sufficient "qualifying wages," section 237 dictates that it disregard any wages earned by the claimant in both the filing and the lag quarters.[5] Id.

Examples illustrate the operation of section 237:

If claimant Smith applied for benefits in the first quarter of 1994, her base period would be the fourth quarter of 1992 and the first three quarters of 1993. If she earned $1160 in one of those base period quarters, $400 in another, and $20 in each of the other two, she would have earned just enough qualifying wages to be eligible for benefits. See Stip. ¶ A.1. n. 3, App. 67; Tr. 23-4; and 820 ILCS 405/500.E (providing that, to be eligible for benefits, a claimant must have earned at least $1600 during the whole base period and at least $440 outside the calendar quarter in which she earned the most wages).

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[5] As used herein:

(a) "qualifying wages" are the wages that a UI claimant earned during the Section 237 base period that can, therefore, be used to establish eligibility when the claimant first applies for benefits.

(b) "disregarded wages" are the wages that a UI claimant earned in either his lag or filing quarter that cannot be used to establish eligibility when a claimant first applies for benefits.

(c) "lag quarter eligible claimants" are the class members who need only their lag quarter wages to become eligible.

(d) "filing quarter eligible claimants" are the class members who need both their lag and filing quarter wages to become eligible.

Consider, in contrast, claimant Jones who, we may assume, also applied for benefits in the first quarter of 1994 and whose base period would therefore be the same as that of claimant Jones (the fourth quarter of 1992 and the first three quarters of 1993). Assume also that claimant Jones earned $1500 in the second base period quarter (January 1 through March 31, 1993), $400 in the third quarter (April 1 through June 30, 1993), and $20 in the fourth quarter (July 1 through September 30, 1993), but none in the first base period quarter (October 1 through December 31, 1992). Assume, too, that Jones earned $20 in the fifth completed quarter prior to filing (October 1 through December 31, 1993). Since the fifth completed quarter prior to filing is the lag quarter, the $20 Jones earned in that quarter is disregarded because section 237 dictates that lag quarter wages are not counted in determining eligibility. Jones is, therefore, ineligible based on her first quarter 1994 claim because, though she earned more than $1600 in her section 237 base period, she did not earn more than $440 outside the calendar quarter in which her wages were highest. See Stip. ¶ A.5 n. 5, App. 68.

In sum, because of section 237, unless a claimant has sufficient qualifying wages in the first four of the last five completed calendar quarters, he is ineligible for benefits when he first becomes unemployed, even if he would have sufficient qualifying wages if his earnings in the lag and/or filing quarter were counted toward eligibility. Id. at ¶ 6, App. 68. Thus, to use our example, Claimant Smith is eligible when she first becomes unemployed, but claimant Jones is not, even if though Jones earned wages in

her lag quarter that, if counted, would constitute enough to qualify her for benefits. Id. ¶ 5, App. 68.

But if a claimant like Jones simply waits until her most recent wages fall into the first four of the last five calendar quarters as defined by a later dated claim, she becomes eligible for benefits. Id. ¶¶ 7-8, App. 68-9. Claimant Jones, for example, will become eligible for benefits if she waits until the second quarter of 1994 to file a claim, because a claim filed during that quarter will permit the wages she earned during the fourth quarter of 1993 to be counted in her base period. Id.

The Director wrongly asserts that the class consists of "claimants who are monetarily ineligible for benefits." Pet. at 5. She can make that assertion only by ignoring two of her own stipulations. First, the class definition itself confirms that class members are claimants who were denied benefits "solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of section 237 of the Act." Stip. at ¶ B.3.a; App. 71-2 (emphasis added). Second, the Director has stipulated that wages that are initially disregarded, because they fall in a claimant's lag and/or filing quarters, become qualifying wages by the passage of enough time so that they fall within the section 237 base period defined by the date of her second claim. Id. at ¶¶ A.7 and 8, App. 68-9. Thus, the Director has admitted that, although class members are treated as ineligible when they first apply for benefits, they become eligible by doing nothing more than waiting until sufficient time has passed to file a second claim.

Accordingly, the class does not consist of "claimants who are monetarily ineligible for benefits." Pet. at 5. It just consists of those who cannot establish their eligibility until they wait for their lag or filing quarter wages to fall within the base period defined by section 237.[6]

B. The Reason Section 237 Delays Payment Of Benefits: Wage Record, Wage Request, And Movable Base Period Systems

Just as the Director ignores the fact that section 237 delays adjudication of eligibility, she ignores the reason why section 237 does so. Each state uses one of three systems for compiling wage data. See Stip. ¶¶ C.1-6, App. 72-3. The most common system, and the one used in Illinois, is the wage record system. Id. at ¶ C.2, App. 73; Tr. 23. Many states once used a wage request system, see id. at ¶ C.4, but, to our knowledge, only New York and New Hampshire still do so. Recently, some wage record states have begun to use "movable" base periods. Id. at ¶ C.6, App. 74; P. Ex. 2.

Under a wage record system, employers that are covered by the state's unemployment insurance statute report gross wages of all their employees to the state unemployment security agency ("SESA") on a quarterly basis. Id. at ¶ C.2, App. 73; Tr. 12, 16. In contrast, under a wage request system, the SESA does not request wage information of a claimant's employer until the claimant applies for benefits, when her wages are required to adjudicate her claim. Id. at ¶ C.4., App. 73; Tr. 11-16.

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[6] Lag quarter eligible claimants must wait from when they apply in their filing quarters until the beginning of the next calendar quarter. Tr. 70. Filing quarter eligible claimants must wait from when they apply in the filing quarter through the whole of the next full calendar quarter until the beginning of the subsequent quarter to file a valid claim. Tr. 70-71.

A wage record system is characterized by the existence of a gap - which is commonly called the "lag" period - between the end of a claimant's base period and the beginning of that claimant's benefit year. Id. at ¶ C.3, App. 73; Tr. 15-20. The Director has admitted that, in wage record states, "[t]his gap is necessary because time is required for employers to report wages to the SESA and for the SESA to make that information available in the local UI offices where claims are first taken and adjudicated." Id. She has also admitted that, in contrast, SESAs in wage request states can request the most recent wage information for each claimant. Id. at ¶ C.5, App. 73-4; Tr. 15-16. Accordingly, in a wage request state, there is no need for a gap (or at least not a long one) between the end of the claimant's base period and the beginning of his benefit year. Id.; Tr. 13-20.

A so-called "movable base period" system retains certain advantages of a wage record system while minimizing the delay that is experienced, because of the lag period, by those claimants who need their lag and/or filing quarter wages to qualify for benefits. See Stip. ¶ C. 6., App. 74; Tr. 27. Under a movable base period system, the state uses a section 237 base period, except that, when an applicant has insufficient qualifying wages in that base period, the SESA promptly redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim.[7] Id.;

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[7] A chart of the base periods used by states as of the trial is Plaintiff's Exhibit ("P. Ex.") 2. Since that chart was developed, however, Maine, Massachusetts, Michigan and Rhode Island have adopted "movable" base periods. See Me. Rev. Stat. Ann. tit. 26, § 1043.3 (1992); Mass. Ann. Laws ch. 151A, § 1(a), as amended by ch. 26, § 6 of the Acts and Resolves of 1992; Mich. Comp. Laws § 421.45, as amended by 1994 Mich. Pub. Act. 162; R.I. Gen. Laws § 28-42-3(10).

see e.g., Ohio Rev. Code Ann. § 4141.01(Q); Tr. 25-27. Vermont also moves the base period to include filing quarter wages earned prior to the claim. 21 V.S.A. § 1301(17).

C. Luella Pennington's And The Class Members' Stories

Luella Pennington applied for UI on June 7, 1984 (the second quarter of 1984), and thereby created a base period of January 1, 1983 to December 31, 1983. Stip., ¶ B.2; App. 70-1. Pursuant to section 237, the first and second calendar quarters in 1984 were not in her base period, because those were her lag quarter and filing quarter, respectively. Id. at ¶ B.2.b.-d; App. 70-71. Looking only to the wages Pennington had earned in calendar year 1983, the section 237 base period defined by her June claim, Pennington was ineligible for benefits. Id. at ¶ 2.c., App 71. Accordingly, IDES denied her benefits based on that claim. Id.; P. Ex. 3.

Pennington remained unemployed, however, and filed a second claim for benefits on or about October 5, 1984. Id. at ¶ 2.e., App. 71. The section 237 base period determined by reference to that October claim included the period from January 1 through June 30, 1984. Id. at ¶ 2.f.; App. 71. That is, by the passage of time, the quarters that had been Pennington's filing and lag quarters when she filed in June, became base period quarters when she filed in October and, consequently, the wages that IDES disregarded for purposes of her June claim became qualifying wages for purposes of her October claim. Id. at ¶ 2.g., App. 71. She thus became entitled to receive benefits. Id.; see Pet. at 5 (although "Pennington was denied ... UI benefits upon filing her June 1984 claim because she had earned no wages during her base period[,] ... [i]n October 1984, she [became] ... monetarily eligible for UI benefits based

on her earnings in the first and second quarters of 1984 (App. 71), and she did receive benefits for the benefit year beginning October 1984 after filing a valid second claim").

To receive UI benefits, however, Pennington had to wait from June 7 to October 5, 1984, whereas, if IDES had used Pennington's lag quarter wages to determine eligibility, she would only have had to wait from June 7 until Monday, July 2, 1984 to file a valid claim. Stip. at ¶ B.2, App. 70-71; Tr. 70-71. Moreover, the Director has stipulated that "[b]y definition, section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of section 237." Stip. ¶ B.3.b; App. 72.

III. THE "WHEN DUE" CLAUSE

The when due clause "require[s] that a State [unemployment insurance] law include provision for such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). That regulatory standard was derived from California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), a case in which this Court considered the legality of a provision that suspended payment of benefits to claimants during the pendency of any appeal by their former employers. Id. at 122. In a unanimous opinion, the Court held that the provision violated the "when due" clause because "'when due' was intended to mean at the earliest stage of unemployment that payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Id. at 131.

Thus, Java struck down a provision that delayed payment of benefits after an initial administrative decision that the benefits were due. But the when due clause requires not only prompt payment of benefits, but also prompt adjudication of claims. This Court made that clear in another unanimous opinion, Fusari v. Steinberg, 419 U.S. 379 (1975), when it expressly rejected any reading of the "when due" clause under which "benefits are not 'due' ... until administratively deemed payable." Id. at 388 n. 15. The Court reasoned that "such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." Id.

The Secretary of Labor also interprets the "when due" clause to require not only "such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible," 20 C.F.R. § 640.3(a), but also to confirm that, "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." Id. at § 640.1(a)(2).

IV. THE COURSE AND DISPOSITION OF THE PROCEEDINGS IN THE DISTRICT COURT AND IN THE COURT OF APPEALS

Because the "when due" clause governs only the "methods of administration" of the states' unemployment insurance programs, 42 U.S.C. § 503(a)(1), "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(a)(2). Accordingly, a state does not violate the "when due" clause by delaying payment of benefits to enforce provisions

that govern eligibility. See, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 482-87 (1977) (provision denying benefits to claimants who were unemployed "due to a labor dispute" did not violate the "when due" clause).

Before the trial in this case, the district court held - three times - that section 237 was a "method of administration" subject to review for compliance with the when due clause. App. 43-7, 53-4, 60-3. After the case was tried, however, the district judge reversed his three earlier rulings and held that "the definition of 'base period' in section 237 of the [IUIA] is a valid eligibility requirement and does not violate [the 'when due' clause]." App. 28, 42.

Eligibility criteria are rules that "define the class of persons eligible for benefits." Ohio Bureau of Employment Services, 431 U.S. at 486-87. Therefore, in the court of appeals, the Director argued "that section 237 functions as a measurement of each claimant's attachment to the work force ... [and] that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement." App. at 21. She also argued that section 237 is an eligibility criterion because it "defines what earnings are considered in determining whether benefits are due." Appellee's Brief in the Seventh Circuit at 31 (emphasis added).

The court of appeals reversed the district court's holding that section 237 defines an eligibility requirement. In rejecting the Director's argument that "section 237 functions as a measurement of each claimant's attachment to the work force," the court observed that the Director "has conceded in more than one place that the gap created

by section 237's base period, in which a claimant's lag quarter wages are not reported, 'is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated.'" App. 21 (citing Stip. ¶ C.3, App. 73) (other citation omitted).[8] The court of appeals concluded from that stipulation that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." Id.

In rejecting the Director's argument that section 237 is an eligibility criterion because it "defines what earnings are considered in determining whether benefits are due," the appellate court observed that, while section 237 instructs IDES to disregard wages when they fall in the lag or filing quarter, it will later count those same wages toward a class member's eligibility if he files a second claim in a later quarter. App. 18; see Stip. ¶¶ A.5-8, App. 68-9; see also pp. 6-7 supra (explaining this point). Accordingly, section 237 does not determine whether IDES counts lag and filing quarter wages in determining whether benefits are due; it just determines when IDES will count those wages and, thus, when benefits become due. See App. 18-19.

Having "reverse[d] the decision of the district court that section 237 is an eligibility provision as a matter of law," App. 24, the panel remanded the case to the district court for "factual findings and a determination of the issue of section 237's compliance with the 'when due' clause and corresponding regulations." Id. at 23-24.

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[8] The Director tries to escape the implications of this admission by arguing that it was merely an "argument" that she "advanced only in the alternative, assuming for the sake of argument that the base period was not an eligibility requirement." Pet. at 9, n. 3. But the admission was not made merely in the Director's argument; it is contained in the Stipulations of Fact and confirmed by uncontroverted testimony. See Tr. 13-20.

The court of appeals then denied the Director's rehearing petition, see id. at 25-6, and her motion for a stay pending this Court's decision on her petition for writ of certiorari. See Resp. App. 1-3. On September 28, 1994, the Director filed her petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES NONE OF THE "SPECIAL AND IMPORTANT REASONS" FOR GRANTING WRITS OF CERTIORARI

S. Ct. Rule 10 identifies "special and important reasons" that, while "neither controlling nor fully measuring the Court's discretion," are the most persuasive bases for this Court's exercise of its authority to review federal appellate decisions on petitions for certiorari. Rule 10 sets forth three such particular reasons, and one more general, "catch-all" reason. The three more particular reasons are when a federal court of appeals: (1) "has rendered a decision in conflict with the decision of another United States court of appeals on the same matter or has decided a federal question in a way in conflict with a state court of last resort"; or (2) "has decided a federal question in a way that conflicts with applicable decisions of this Court"; or (3) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Id. at subsections (a) and (c).

The Director does not suggest that any such reasons support her petition. Indeed, she concedes that there is no conflict between the Seventh Circuit's decision below and a decision of any other federal court of appeals or any state court of last

resort. Pet. at 7 (characterizing this as "a case of nationwide first impression"). And not only is the court of appeals' decision not in conflict with any applicable Supreme Court precedent, but the court of appeals understood its ruling to follow from two unanimous Supreme Court cases: California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) and Fusari v. Steinberg, 419 U.S. 379 (1975). See App. at 19-21. Moreover, the Director suggests no irregularity in the procedures below at all, let alone any that would require an exercise of this Court's supervisory authority.

The only reason identified in Rule 10 that the Director even arguably urges as a basis for this Court to hear this case is that "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Rule 10(c). Actually, the Director does not expressly invoke even that reason as a basis for her petition, but since she asserts that "the decision below addressed a question of exceptional importance," Pet. at 7, and since no other reason is even conceivably applicable, that must be the Rule 10 ground on which she relies.

"[E]xcept in extraordinary cases, [however,] the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). Thus, that the Director seeks review of a judgment that is not final may "of itself alone" be a "sufficient ground for denial of ... [her] application." Id.; see Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not ripe for review by this Court"). Therefore, the Director must overcome a heavy burden to

establish that this case presents "an important question of federal law which ... should be settled by this Court." S. Ct. Rule 10(a). See also, Rudolph v. United States, 370 U.S. 269, 270 (1962) (dismissing writ of certiorari as improvidently granted where review of issue presented "would be of no importance save to the litigants themselves").

To meet that burden, the Director argues: (1) that the panel decision "will cause nationwide disruption in the various states' unemployment compensation systems," Pet. at 9 (quoting the Brief [in the court of appeals] for the United States of America as Amicus Curie at 19-20); and (2) that its decision is "wrong." Id. at 7 ("the decision below ... [is] beyond precedent and contrary to the federal administrative interpretation ... [and it] extended the scope of the federal mandate of prompt administration of state unemployment insurance laws to Illinois' base period requirement, which measures monetary eligibility for benefits"). Both of those arguments, however, are wholly without merit.

A. The Court Of Appeals' Decision Will Not Disrupt The Unemployment Insurance System

The Director asserts that the court of appeals' decision will disrupt the nation's unemployment insurance system because 45 states use a base period definition like

Illinois."[9] But the court of appeals' decision may not affect, much less disrupt, even Illinois' unemployment insurance program, because the panel remanded the case to the district court to determine, as a matter of fact, "whether ... [section 237] is compatible with the 'when due' clause." App. 23. Accordingly, the court of appeals' decision, by itself, dictates no modification to Illinois' base period provision, let alone that of any other state.

The Director argues however that, even if the claimants are not ultimately successful in convincing the lower federal courts that section 237 is unlawful, that result "would leave ... [Illinois] - and other similarly situated States - with the continuing need to litigate and justify base period methodology any time that a creative plaintiff advances an alternative that the courts had not already considered." Pet. at 9. To our knowledge, however, this is the only pending case in the country raising the issue as to

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[9] Actually the Director tries to inflate that number by her assertion that "forty-seven other states ... use a base period similar to the one challenged here." Pet. at 7-8 (quoting Amicus Br. at 18). Deep within the footnote in which she cites the 47 statutes, however, the Director notes that seven of those are states that now "use[] the type of movable base period advocated by the plaintiff class as an alternative [to Illinois']." Id. n. 2. Thus IDES includes among the statutes that are "similar to" the one we challenge, seven that are "the type advocated by [us]."

So far as we know, the actual breakdown is as follows: two states, New York and New Hampshire, still use a wage request system in which no lag period is necessary; seven states, Maine, Massachusetts, Michigan, Ohio, Rhode Island, Vermont and Washington, use wage record systems, but they employ movable base periods that minimize the delay in payment of benefits that is caused by the lag period that otherwise characterizes such a system; and the other 44 (including Illinois) use wage record systems with lag periods like the one created by section 237. See Pet. at 8 n. 2. There are 53 total "states" because the District of Columbia, Puerto Rico and the Virgin Islands are counted as states. See Unemp. Ins. Rptr. (CCH), ¶¶ 3000-3062 (All-State Charts) (1994).

which the Director seeks [illegible][10] And it is hard to imagine that other plaintiffs will jump at the chance to [illegible]gate this issue if the Director wins on remand.

Moreover, the panel's ruling does not encourage litigation "any time that a creative plaintiff advances an alternative that the courts had not already considered." Pet. at 9. As the court of appeals noted, the claimants amended their original complaint, in which they had "alleged that it was administratively feasible ... for IDES to include as the four-quarter base period both the lag quarter and, if necessary, the filing quarter ... [to] allege[] only that it would be administratively feasible for IDES to consider the lag quarter in calculating a claimant's qualifying wages." App. 5-6 (interior quotations and citation omitted). We did so after our expert witness, Peter Kauffman, had studied IDES's system and concluded that it would not be administratively feasible for IDES to include filing quarter wages in determining a claimant's eligibility. [11]

Furthermore, Kauffman testified that there were three alternative methods by which IDES could move the base period to capture lag quarter wages when necessary to determine a claimant's eligibility, and that Alternatives II and III are "administratively feasible" in the sense that, if there was no cheaper alternative, the costs of those systems would be worth the benefits they would generate to the claimants. Tr. 78-79; 88-89; 700-701. But, as the court of appeals expressly noted, Kauffman testified that

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[10] One other case, Duncan v. Washington, C86-227 (D.C. Wash.) was filed to contest the system that was once used in the State of Washington. But that case was dismissed after Washington adopted a movable base period system. See Wash. Rev. Code § 50.04.020 (1991).

[11] Of course, use of lag quarter wages would help filing quarter eligible claimants since it would allow them to file valid claims three months sooner than under the current system. See e.g., pp. 9-10 supra describing Ms. Pennington's facts.

"the marginal expense of ... [Alternatives II and III], in comparison with Alternative I, exceeded their marginal benefits." App. 8, n. 3. Thus, as accurately described by the court of appeals, the claimants' evidence supports a narrowly based challenge to the section 237 base period, not a challenge based on any "conceivable" alternative base period.

While the possibility that there will be any other litigation respecting the legality of section 237 base periods is uncertain, the prospect that there might be such litigation offers a reason not to grant the writ in this case. This is so because, if, on the one hand, another federal appellate court disagrees with the panel decision below, it will create the type of decisional conflict that would crystallize review of the later appellate decision. See Rule 10(a); see also, McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied when issue requires "further study" in lower courts "before it is addressed by this Court"). If, on the other hand, other appellate courts addressing the issue here agree with the panel decision, that will confirm that the panel below was correct and thus, strongly suggest that this Court need not allocate its resources to the resolution of the question the Director presents.

Even if the panel decision below were to give rise to many other cases as the Director predicts, her contention that such cases "will cause nationwide disruption in the various states' unemployment compensation systems," Pet. at 9, does not follow. After all, the provision that this Court struck down in Java was used in 48 states. See Appendix to Appellants' Brief in Java, No. 507 (U.S. Sup. Ct. 1970) at 69-70. Yet the

Director offers no evidence that Java disrupted the nation's unemployment insurance programs at all.

The contention that court orders requiring some states to modify their base periods will cause "nationwide disruption" of the unemployment insurance system is unwarranted in two respects. First, it wrongly impugns the ability of SESAs to modify the administration of their programs to conform to the requirements of the "when due" clause. Second, it wrongly suggests that federal district judges will be faithless to their obligation to "minimize [the] abrasive potential" of prospective remedies. Jenkins v. Bowling, 691 F.2d 1225, 1234 (7th Cir. 1982); see also, Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991) (Eleventh Amendment to United States Constitution forbids payment of retroactive benefits to unemployment compensation wrongly denied such benefits), cert. denied 112 S. Ct. 992 (1992); Esparza v. Valdez, 862 F.2d 788, 794 (10th Cir. 1988) (same), cert. denied, 492 U.S. 905 (1989).

B. The Court Of Appeals' Decision Was Correct

The heart of the petition is the Director's argument that the court of appeals was wrong in concluding that section 237 is an administrative method subject to review for compliance with the "when due" clause rather than an eligibility provision which is not subject to that review. Pet. at 10-15. That is a precarious basis on which to ground a petition for certiorari, however, for the correctness or error of a decision below is not determinative of this Court's discretion to exercise its certiorari jurisdiction. Accordingly, this Court has been reluctant to grant certiorari solely to review a decision that appears to be erroneous. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974); see

generally, Stern, Gressman, Shapiro, Geller, Supreme Court Practice (7th ed. 1993) at § 4.17.

In any event, the court of appeals decision is clearly correct: the lag period that section 237 creates is an administrative method, not an eligibility criterion:

1. As we have explained, to press her contrary argument in the court of appeals, the Director characterized section 237 as a provision that "defines what earnings are considered in determining whether benefits are due." Appellees Br. at 31 (emphasis supplied). The court of appeals, however, properly recognized that section 237 does not determine whether IDES counts lag and filing quarter wages in determining whether benefits are due; rather it determines when IDES will count those wages and, thus, when benefits become due. App. at 18-22; see pp. 12-13 supra.

In her petition, the Director makes the same argument, but recasts it slightly. First she notes that both that the earnings requirement and the requirement that these earnings fall within a one-year period prior to the date of application are legitimate eligibility criteria that Illinois may enact and modify without concern that its choice might offend the "when due" clause. Pet. at 10.[12] She then assumes that the "base period" definition in section 237 is nothing more than the one-year period within which claimants must earn at least the minimum earnings, and she therefore characterizes the base period as a "component" of the earnings requirement. Id. Based on that assumption, she argues that "[i]f an earnings requirement is not objectionable as an

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[12] Indeed, as the Director notes, those provisions of the IUIA are not in dispute. Id ("neither the plaintiff class nor the Seventh Circuit disputed that Illinois' requirement of certain earnings during some stated time frame is a legitimate measure of eligibility for UI coverage").

eligibility criterion, the specific components of that criterion should be recognized as substantive eligibility requirements, rather than methods of administration." Id.

But the very fact that we challenge neither the earnings requirement nor the one-year time period, along with the fact that we do challenge some aspect of section 237, confirms that the base period definition in section 237 is not merely a one-year period during which a claimant's earnings must fall. Rather, the other aspect of section 237, and the one that we do challenge, is the unnecessarily long lag period between the date on which a claimant's base period ends and the date on which he or she files a claim.

Moreover, the lag period is not a component part of the earnings requirement. That is certain because other states, which necessarily must have some earnings requirement confined within some time frame, use a wage request system or a movable base period to eliminate the lag period (or to minimize the delay in paying benefits that it otherwise causes). Thus, Illinois' choice to have a relatively long lag period is wholly independent of its choices as to how much earnings a claimant must have to qualify for benefits or the length of time during which those wages must have been earned.

While the lag period is not a component part of the earnings requirement, it surely is a component part of a non-movable wage record system. Indeed, the Director herself has repeatedly admitted that the "gap between the end of a claimant's base period ... and the beginning of that claimant's benefit year ... is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims

are first taken and adjudicated." Stip. ¶ C.3, App. 73; see also, Appellee's Br. at 42 ("Section 237's base period facilitates the State's utilization of wage recording"). And, as the court of appeals concluded, those admissions confirm that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system. In a world of high-speed information exchange, the lag quarter would not exist; yet an eligibility requirement like the 'voluntary leaving' provision [which disqualifies claimants who voluntarily leave work without good cause attributable to the employer] would. " App. at 21 (citation omitted).

2. The Director strains to avoid the implication of her admission that the lag period is an administrative method designed to permit administration of a wage record system. She does so by arguing that, since eligibility criteria "define the class of persons eligible for benefits," Hodory, 431 U.S. at 486-87, "wage requirements during a base period serve to guarantee a worker's recent attachment to the labor market ... [and that i]n establishing a threshold earnings qualification, Illinois intended to exclude from eligibility those claimants who generally have the most tenuous attachment to the workforce." Pet. at 14. That is surely so, but while that statement explains why states have earnings requirements, it tells us nothing about why states like Illinois have relatively long lag periods. Indeed, as the Director has admitted, a lag period does not "exclude ... claimants ... from eligibility" or otherwise "define the class of persons eligible for benefits." Hodory, 431 U.S. at 486-87. It just delays the time at which the state will consider the wages a claimant most recently earned in determining his or her eligibility. Stip. at ¶¶ A.7 and 8, App. 68-9.

Furthermore, the Director's argument implicitly concedes that "eligibility criteria measure a claimant's 'continued and current attachment to the labor force.'" App. at 18 (quoting Fleiszig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818, 821 (1952)); see Appellee's Br. at 30, 32. But the lag period "causes class members with relatively strong attachment to the work force to wait until that attachment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over)." App. 18-19. Accordingly, as early as 1962, the Secretary of Labor advised states that "[s]ince unemployment insurance is designed to compensate wage loss, benefits should be based upon comparatively recent wages -- i.e., the lag between the base period and benefit year should be as short as possible." Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962, court of appeals' Appendix item VIII at 97.[13]

Indeed, the Director herself argues that the base period is an eligibility requirement because it "defines a worker's recent employment history." Pet. at 14 (emphasis supplied). If that is so, however, Illinois' use of a base period that creates a relatively long lag period between the employment history and the date of application, instead of using a claimant's most recent employment history, is entirely anomalous. A stipulated fact resolves that anomaly by confirming that the lag period has nothing to do

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[13] The Director has abandoned the argument that the Secretary's interpretation confirms that the base period definition in section 237 is an eligibility criterion, except to characterize the court of appeals' decision as "contrary to the federal administrative interpretation." Pet. at 7. But that glancing and unsupported attack is woefully inadequate given the court of appeals' thorough consideration and rejection of the "deference" argument. App. 12-16.

with measuring a claimant's employment history, but that, instead, it "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." Stip. ¶ C.3, App. 73. And since that is so, "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." App. 21.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JEFFREY B. GILBERT
Johnson, Jones, Snelling & Gilbert
343 South Dearborn Street
Suite 1110
Chicago, Illinois 60604
(312) 341-9366

ROBERT E. LEHRER
DORY RAND
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604
(312) 341-1070

RESPONDENT'S APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 16, 1994.

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellant,

No. 92-3725 v.

LOLETA DIDRICKSON*, Director of the Illinois Department of Employment Security

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 6327
Paul E. Plunkett, Judge.

ORDER

This case is before the court on the motion of the appellee to stay the issuance of this court's mandate while the appellee seeks review of the judgment of this court by a petition for a writ of certiorari in the Supreme Court of the United States. By opinion dated April 11, 1994, this court reversed the judgment of the district court and held that section 237 of the Illinois

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Directors of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

Unemployment Insurance Act (the "IUIA"), 820 ILCS 405/237, is an administrative method subject to the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1), and its corresponding regulations. We therefore did not accept the appellee's characterization of the provision as an eligibility provision beyond the reach of the "when due" clause. We remanded the case to the district court for further proceedings to determine whether section 237 complies with the "when due" clause and the corresponding regulations. A subsequent petition for rehearing was denied and no member of the court requested a vote on the appellee's suggestion for rehearing en banc.

The standards governing a motion for stay of mandate are set forth in detail in United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). Familiarity with that opinion is presumed and the discussion of the applicable standards will not be repeated here. In this case, an assessment of the probability of success in further review must rest on the plenary discussion of the submissions of the parties in the unanimous opinion of the panel. It is also worthy of note that the panel has already reexamined its analysis in its consideration of the petition for rehearing and declined to alter its judgment. Moreover, the other members of the court were invited by the appellee to ask for rehearing en banc and no member of the court asked for a vote on that suggestion. Finally, no showing of irreparable harm has been made by the appellee. The judgment of this court contemplates further

proceedings in the district court. In those proceedings, the district court may determine that section 237 complies with the "when due" clause.

Accordingly, the motion for stay of mandate is denied.

MOTION DENIED.

GLOSSARY

GLOSSARY

Terms	Definitions
App.	The appendix bound with the Director's Petition For Writ Of Certiorari.
benefit year	The one-year period beginning with the Sunday of the week in which a UI claimant first files a valid claim for benefits. 820 ILCS 405/242.
base period	The period prior to the date on which a UI claimant files a claim during which the claimant must have sufficient earnings to qualify.
class members	All claimants for UI benefits under the IUIA who since July 15, 1983, have been, are being or will be denied such benefits by IDES solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the IUIA, were disregarded by operation of section 237 of the IUIA.
determination	A decision issued by IDES pursuant to section 702 of the IUIA, 820 ILCS 405/702, concerning whether a UI claimant should be denied benefits for any reason other than whether he has sufficient earnings in his base period to qualify for benefits.
Director	The Director of the Illinois Department of Employment Security
disregarded wages	The wages that a UI claimant earned in either his lag or filing quarter that cannot be used to establish eligibility when the claimant applies for benefits.
earnings requirement	The eligibility requirement for receipt of UI benefits in Illlinois under which, a claimant must have earned at least $1600 during the whole "base period" and at least $440 outside the calendar quarter in which he earned the most wages. See 820 ILCS 405/500.E.
filing quarter	The quarter in which a UI claimant first files a claim which is also the sixth quarter after the beginning of the section 237 base period.

filing quarter eligible	The class members who need both their claimants lag and filing quarter wages to become eligible.
filing quarter wages	The wages a UI claimant earned in the quarter in which she files for benefits. Filing quarter wages are disregarded because of section 237.
finding	A decision issued by IDES pursuant to Section 701 of the IUIA, 820 ILCS 405/701, concerning whether a UI claimant has sufficient earnings in his base period to qualify for benefits.
IDES	Illinois Department of Employment Security
IUIA	Illinois Unemployment Insurance Act, 820 ILCS 405/100 et seq.
lag period	The gap in a wage record state between a claimant's base period and his benefit year
lag quarter	The completed calendar quarter just prior to a UI claimant's filing quarter which is also the fifth calendar quarter after the beginning of the section 237 base period.
lag quarter eligible	The class members who need only their claimants lag quarter wages to become eligible.
lag quarter wages	The wages a UI claimant earned in the completed calendar quarter prior to the quarter in which she files for benefits. Lag quarter wages are disregarded because of section 237.
movable base period	A base period system used in which an SESA first looks at wages earned in the section 237 base period, but for claimants who lack sufficient qualifying wages in that period, the SESA then redetermines the claim using wages earned in the lag quarter and, in Vermont, in the weeks of the filing quarter prior to the claim.
Pet.	The Director's Petition For Writ Of Certiorari
P. Ex.	Plaintiffs' trial exhibits

qualifying wages	The wages that a UI claimant earned during the section 237 base period that can, therefore, be used to establish eligibility when the claimant applies for benefits.
Resp. App.	Respondent's Appendix which is attached to this Brief In Opposition To Petition For Writ Of Certiorari
Secretary	The United States Secretary of Labor
section 237	Section 237 of the IUIA, 820 ILCS 405/237, which defines the base period used in Illinois.
section 237 base	The first four of the last five period completed calendar quarters immediately preceding a claimant's benefit year.
SESA	State employment security agencies which are the agencies in each state that administer the UI program. IDES is the SESA in Illinois.
Stip.	The Stipulations Of Fact in Section III of the Amended Final Pretrial Order which is at App. 66-83.
Tr.	The trial transcript
UI	Unemployment Insurance
valid claim	A claim for UI filed by a claimant who had sufficient earnings in his base period to qualify for benefits. See 820 ILCS 405/242 and 500.E.
wage record system	A system for acquiring wage data to determine eligibility for UI in which employers that are covered by the state's unemployment insurance statute report gross wages of all their employees to the SESA on a quarterly basis, and in which a "gap" called a "lag period" between the base period and the benefit year is necessary to permit the employers to report and the SESA to post claimants' wages.
wage request system	A system for acquiring wage data to determine eligibility for UI in which the SESA does not request wage information of claimants' employers until claimants apply for benefits, when the wages are required to adjudicate claims.

"when due" clause	Section 303(a)(1) of Title III of the Social Security Act, 42 U.S.C. § 503(a)(1) which requires that state unemployment insurance laws provide for "such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

NO. 94-592

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

PROOF OF SERVICE

JEFFREY B. GILBERT, one of the attorneys for Respondent herein, hereby certifies that on October 27, 1994, copies of the attached **MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS, AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS**, and **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** were served upon:

DEBORAH L. ASHSTRAND
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Service was by hand-delivery (via messenger).

JEFFREY B. GILBERT